INSTITUTES

OF THE

L.A.W SCOTLAND.

VOLUME FIRST.

Comprehending the

PRIVATE LAW:

To which is subjoined,
The Constitution of the Session, &c.

And of the

COMMISSION for Plantation of CHURCHES, Valuation of TITHES, &c.

With a SCHEME of the found of Process observ'd in these Counts.

By WILLIAM FORBES Advotate,
Professor of LAW in the University of Glasgow.

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Printed by J. Watson, J. Mosman and Company, and fold by W. Brown at his Shop in the Parliament-Closs. 1722.



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D. WILL DANG PORTIS AND CORP. Profesior of L A w in the Uni crisity of Glaffers.

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To the Right Honourable,

ARCHIBALD

Earl and Viscount of ILAY,

Lord Oranfay, Duncon and Arrofe,
Lord Privy-Seal, Lord Justice-General,
An Extraordinary Lord of Session, and one
of His Majesty's most honourable
Privy-Council.

My LORD.



O whom should the first Volume of the Institutes of the private and publick Laws of Scotland be

and Approbation, than to for a great

The DEDICATION.

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great a Judge of both, as your Lordship has approv'd your self to be, in the due and skilful Application of the Principles thereof to particular Cases: Not only in the highest Court of the last Resort above, and at the Council Board, where your natural Eloquence, polite Learning, exquifite and comprehensive Knowledge of the Laws Canon, Civil, and Municipal, imployed to the best Purposes, have eminently appeared; But also in the Court of Session, as an extraordinary Lord; and in the prime Criminal Judicature, as Lord chief Justice, or Justice General of Scotland? Which last Character of high Authority, was once intail'd as Inheritance on your illustrious and potent

The DEDICATION.

potent Ancestors, the Earls of Argyle; who have always signaliz'd themselves, in protecting the Sacred and Civil Liberties and

Interests of their Country.

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Permit me therefore (My LORD) to flatter my self that, as the noble and useful Subject treated of in this Book, has some Claim of Right to fuch a Patron; who adorns his high Blood, and all Things that come into the List of transcendent Accomplishment, with a hearty Zeal for the present Establishment of Church and State, and an affectionate steady Loyalty to our Gracious Sovereign King George, the great Defender thereof: So this Address from a Professor in an University, where your Lordship was early

The DEDICATION.

carly season'd with the first Part of that Education, now so brightly improv'd, will not be altogether unacceptable. It is what the Members of that little Commonwealth of Learning have justly to boast of, that your Lordship was once some Time in a Course of Study there; And I presume to take this Way, in my private Sphere, to testify how much I am, with all Sincerity, and prosound Respect,

MY LORD,

Your Lordship's most obedient,

and devoted humble Servant,

WILLIAM FORBES.



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AVING made the Study of the Laws the Buliness of my whole Life, I did, fome Years ago, fet about the Compiling of a great Body of the Law of Scot-

land: Containing its Harmony with, and Differences from the Civil and Feudal Law: and shewing how far the Scottish and English Laws do agree and differ; with incident comparative Views of the Modern Constitutions of other Nations in Europe: Which was to confid of Two Volumes. In the first I design'd to treat of the Private Law, which mainly respects private Property; the Interests and Differences of particular Persons

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Persons among themselves. The second Volume was to fet forth the Publick Law, which contains all Matters, that have any Relation to the Order of the State: As the Power, Rights and Prerogatives of the Sovereign, Queen Confort, and the Prince; the Functions and Duties of Officers of State and the Crown; Jurifdiction Civil, Ecclesiastical and Military: the Parliament, Privy-Council, Courts of Judicature, Sovereign and Subordinate; the Order of judicial Proceedings therein; the Constitutions, Privileges, Statutes and Rules of Corporations, and Bodies Politick, as Burghs, Univerlities, &c. And lastly, the Criminal Law. Out of both these Volumes, when finished, I propounded to draw a comprehensive Inftialso of Two Volumes, in the same Order and Method with that of the Great Body. for the Use of such as shall Study Law under my Care and Direction in the University of Glasgow.

The first Volume of the Great Work, wherein the Private Law is handled, being in some Measure finished, and a good Advance made in the other: The first Volume

Volume of the Relative Institute doth now come forth to publick View, to be follow-

ed by the other in its due Time.

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In fo doing, I not only Copy after the Learn'd John Voet, late Professor of Law in the University of Leyden, whose Compendium of the Roman Law was published before his Commentary came to Light: But also have before me the Example of the Great Justinian, by whose Order his Institutes, composed after the Pandects, were promulged before them. I have nothing less in View, than to derogate in the least from the Value of Sir George Mackenzie's Book, which is got into most Hands, and hath hitherto been Useful to initiate Persons in the Study of our Law: But several Things notwithstanding, mov'd me to think of fuch a Composure. 1. Great Alterations have been made in the Law of Scotland, fince that learn'd Man writ; and several Points controverted in his Time, are now clear'd up, and established by a Tract of Uniform Decisions. 2. Some Matters of the Private Law, and many of the Publick, are not taken Notice of by him at all; and others only in a Word or two en Paffant,

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Passant, so as the Student can reap but little Instruction from thence. 3. Tho' Sir George's Authority goes a great Way with me, I cannot help differing from his Opinion in some Points. 4. Seeing every one has a peculiar Method of digesting his Thoughts, as well as a certain Turn of Thought and Notion; I found my self concern'd, in the discharge of my Academical Function, to Reduce and Range the Fundamentals of our Law in such Order, as I conceiv'd most Natural, and adapted to Teaching.

The Method pursued in this Volume, is as follows. I have premised a Preliminary Differtation concerning Law in General, and the several Kinds of it, as the Laws of Nature, and Nations, and Civil Laws, particularly the Municipal Law of Scotland, with the several Grounds and Foundations thereof, how it is raised, founded on, and influenced by the Laws aforesaid; the Civil Law of the old Remans, the Canon, and Feudal Laws, which

are fuccinctly described and inell mod

Parts. The first Part concerns Persons in their Natural, and in their Relative or

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Civil Capacities; and confifts of two Books. The first Book considers Persons in their Natural Capacities, as diftinguish'd, I. By their Sex, into Males and Females. 2. By their different Ages, into Pupils, Minors, and Majors: And with Respect to those under Age, Tutors, Curators, Pro-Tutors and Pro-Curators are discoursed of 3. Persons are confidered as differenced from others, by fome Incapacity of Mind or Body, fuch as Idiots, Furious Persons, &c. and those interdicted. The second Book treats of Persons in their Relative or Civil Capacities. 1. General, of ordinary Subjects, Perpetual and Temporary; the Clergy and Laity. 2. Particular, of Man and Wife, Parents and Children, Masters and Servants

Estates, and how acquired, extinguish'd, and affected with Burdens, are the Subject of the second Part, which contains three Books. In the First, Possession and Property, the Nature, and several Kinds of them, and the general Ways of acquiring Rights to Things consisting of Property and Possession, are handled. The second explains real and heretable Rights:

Rights: How they are constituted by Charter and Seisin; what the Vassal gets thereby, and what remains with, and belongs to the Superior, called the Superiority and Casualities thereof; and the Burdens both private and publick, wherewith real Rights may be affected. The third Book turns upon Obligations, and personal Rights of all Kinds: And is shut up with the Ways how such Obligations, or personal Rights are annull'd and Extinguished.

guished.

The third Part handles the Transmission, and paffing over of Estates from one to another, whether a fingular, or universal Successor, and consists of two Books. The first comprehends the Transmission of Property to fingular Successors. voluntary Deeds of Alienation. the legal Diligence of Creditors. 3. By Confication. In the penult Chapter of which first Book, Trust, a Quality often affecting the Conveyance of Rights, is handled. And laftly, Prescription, a Way of acquiring and losing of both heretable and personal Rights, is treated of, after all these have been explain'd. The second Book clears the Transmission of Property

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cutors, term'd Succession. Which is discoursed of, both in general, and in Particular, 1. With Respect to Heretage.

And, 2. In Relation to Moveables.

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The fourth Part holds forth the Ways of determining all civil Controversies in Point of Right and Possession: Which is divided into two Books. The first shews. how fuch Controversies are decided extrajudicially, without going to Law, either by Act of one of the Parties; or where all Parties mutually consent, by Transaction, or Submission: Or, in a judicial Way, by Action in a Court of Justice. The second Book, for Connexion fake, gives an Account of the Seffion, the Offices relative and fubservient to it; and of the Commission for Plantation of Churches, and Valuation of Tithes, &c. with a general Scheme of the Method and Form of Proceeding in these Courts.

I shall no further forestall my Book, by giving a more minute Account of the Contents thereof: But only acquaint the Reader in general, that it hath been my chief Care, neither to overlook, nor too much contract any necessary Part of our

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viii The PREFACE.

of my Capacity; and to advance nothing but what I can vouch, and make good by sufficient Authorities.

And, E. In Relation to Moveables, The follows Part holds forth the Ways of determining all civil Controles in Points of Kight and Poledion: A bedra divided into two Books. The fact thewas how up to Controles are decided extrapolationally, without going to Law, enhancing the Parties mutually without going to Law, enhanced by AB of one of the Parties; or where all farties mutually and the Parties of the Malation of the Method and Parties of the Method and Parties of the Method and Parties of the Courts.

I shall no further forestall my Bool, by giving a more minute Account of the Contents thereof: But only acquisint the Reader in general, that it hash been may chief. Care, neather to earlook, nor too thirty Care, neather to earlook, nor too private of our private and



INSTITUTES

LAW of SCOTLAND.

Preliminary Differtation

CONCERNING

LAW in GENERAL, and the SEVERAL KINDS of it.



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A W is taken in a two-fold Sense:

1. For the Precept or Command of a Supreme Power, obliging Subjects to act, or not to act, under a Penal-For a Science or Collection of such

ty. 2. For a Science or Collection of fuch Precepts.

CHAP.

CHAP. I.

Of Law considered, as the Command of Sovereign Power.

A W, in this Sense, may be divided, with Respect to the efficient Cause, into a Law of Nature, and positive Law.

A Law of Nature is the Dictate of Right Reason, which discovers the various Relations, and Duties of Creatures toward their Creator, or one another, and lays them under an Obligation to act in this or that Manner, according to the Circumstances in which they are plac'd. The very Notion of a Law implies that of a Lawgiver; and in this Case there can be no other than God himself the Anthor of Nature, from whom this Law derives its Authority. The Sting of a disquieted Conscience, or the Terror and Uneasiness arising from any gross Breach of the Law of Nature, sufficiently declare, that it is not left without a Sanction.

Positive Law is either Divine, or Humane.

A Divine positive Law is the Will of God

reveal'd in the holy Scriptures.

Humane positive Law, is that, which derives its force from the Authority of Men, introduc'd, as Occasion required, about Things either consequential from, or left indifferent by the Laws of God and Nature.

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Positive humane Law is distinguished into a

Law of Nations, and a civil Law.

The Law of Nations is taken in a twofold Sense. 1. It fignifies an improv'd Dictate of natural Reason, deduc'd by long Experience and Practice, from a Confideration of the Nature of Society, and from Inquiry into the Difpositions of Mankind, Necessity or Conveniency; and upon these Considerations observ'd by all civiliz'd Nations. In which Sense the Law of Nations is understood in the Roman Law. 2. A Law of Nations is a common Law betwixt different Nations, for regulating the Order of mutual Commerce, which is the modern Acceptation of the Word. This Law ariseth from a tacit or express Compact and Stipulation betwixt Nations, and derives its Authority from that golden fundamental Rule of Society; Faith is not to be violated.

A Civil Law is, what the Sovereign Power in every Nation, whether Monarchical, Aristocratical, or Democratical, hath made for their own peculiar Conveniency, to govern the People united by the Ties of Society, under

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CHAP. II.

Of Law considered as a Science, or Collection of the Precepts of Sovereign Power.

AW, in this Sense, is, a Science directing us to know, and do Justice, for the well ordering of Society.

Justice, which is the End of Law, is a constant and perpetual Desire of giving to every

one his Due.

There is no authoriz'd Collection of the Laws of Nature and Nations any where, fave in the Books of the Roman Law. But we find fo many different Collections of civil Laws, as there are independent Nations, governed by their own Laws. When the civil Law in general is mentioned, the Law of the old Romans is understood, which, for its Excellency, is so calcalled nat' exocupy; and the Laws of other Nations are term'd municipal Laws.

CHAP. III.

Of the Municipal Law of Scotland.

HE Municipal Law of Scotland, which directs to the Knowledge and Practice of what is Justice in Scotland, is raised upon eleven Foundations. 1. Upon the Law of Nature. 2. Upon the reveal'd Law of God. 3. Upon the Law of Nations. 4. Upon

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Upon the Civil Law. 5. Upon the Canon Law. 6. Upon the Feudal Law. 7. Upon fome old Books. 8. Upon Acts of Parliament, and of Convention of Estates. 9. Ancient Customs. 10. Acts of Sederunt, and Decisions of the Court of Session. 11. By-Laws or Statutes of particular Corporations, or Bodies politick. Of each of these I shall discourse particularly in the following Titles.

TIT. I.

The Law of Nature.

OUR Law gives a civil Sanction to some Laws of Nature, for the better Observance thereof: As when it forceth Husbands to aliment their Wives, and Parents their Children. Others it allows no Effect to: As the Obligations of Love and Charity, Donations betwixt Man and Wife, and Deeds by the latter, without Consent of the former. Some of these again our Law doth qualify; as the Succession of Children to their Parents Heretage, by the Right of Primogeniture.

TIT. II.

The Divine Law.

THE Law of Scotland is founded on the revealed Law of God, in so far as, it not only punisherh Breaches of the Moral Law, but A 3

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w 4. on also annuls all Laws not agreeing with the holy Scriptures (a).

TIT. III.

The Law of Nations,

OUR Law observes the Law of Nations, in so far, as, 1. It orders the Method of maintaining ordinary Commerce, and Correspondence betwixt them. 2. Prevents Infracti-

ons of the ordinary Laws of Nations.

1. Necessary Commerce between Nations is founded upon publick Agreements or Treaties, made by the Mediation of Ambassadors, Envoys, Oc. to whom great Privileges are indulg'd: As that their Persons, or Domestick Servants may not be arrested, or imprisoned, or their Goods distrenzied, seiz'd or attach'd, provided no Bankrupt Merchant, or Trader have any Benefit of Protection, by putting himself into the Service of any Ambassador, or publick Minister; nor any Servant of theirs be thus privileged, till his Name be registred in the Office of one of the principal Secretaries of State, and thence transmitted and hang'd up in the publick Offices of the Sheriffs of London and Middlesex (b).

2. Infractions of the Laws of Nations are restrain'd by Reprisals, open War, and other Ways, suited to the Ruptures and Attempts,

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⁽b) 7 A. Chap. 12.

[1.] Reprisals or Letters of Reprisal, is a Warrand or Commission granted by the King, whose Subjects, those under the Dominion of another Prince or State, have injured by Pillage, Piracy, or otherwise, to Seize upon the Goods of all the Subjects of that Other, after Refusal to make just Reparation for the wrong done.

[2.] War, which, in the General, is the State and Condition of those that contend by Force, should commence and be directed by the supreme Authority on both Sides: Whether the War be Offensive or Defensive. There may be so many Causes of a just War, as there are Causes of Civil Actions. At proclaiming of War, Intimation is ordinarly made to Neuters, from what Kind of Commerce with the Enemy they are to abstain, as the carrying counterband Goods to their Ports, transporting their Goods or Merchandize to promote their Trade, and enable them to maintain the War, covering the Enemies Ships and Goods, as belonging to themselves, by Passes and other Documents.

The main private Interest in publick War, is, that which accrueth to Privateers or Capers, by feizing in virtue of Commissions from the Admiral, the Ships and Goods of the Enemy, and fuch as partake in the War, or earry not themselves as Neuters to the Princes or States engaged therein. The Prizes or Seizures belong to the Privateers who make them, with the

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Burden of paying a fifteenth Part to the King, and a tenth to the Admiral. The Admiral is the fole Judge in the first Instance of all Prizes taken at Sea. But the Lords of Session may Suspend or Reduce his Decreets. If Adjudication of Prizes by the Admiral be, after they are rouped and sold, reduced by the Lords, the Owners of the Privateer are liable in solidum for the whole Price received, and not each provata, only for his Share. Things taken by the Enemy, and retaken from him during the War by the King's Subjects or Souldiers, ought to be restored to the former Proprietors.

TIT. IV.

The Civil Law.

Order of Justinian the Emperor) confishing of Imperial Constitutions, older and later, contained in the Code and Novels, Opinions of the old Lawyers, published in the PandeEts or Digests, and that Emperor's Institutes, which are a short Sum and Elements of the Law, is effectually naturalized in Scotland. Tis the great Foundation of our Laws and Forms, so twisted therewith, that our Judges have recourse to that excellent Fountain of Equity and Justice, where our own Customs and Statutes are silent and defective. The Parliament doth, in some Statutes, expresly own it

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it to be our Law (a); and the general Revocations of our Princes are founded upon it. In other Statutes, the Force and Authority of the Civil Law with us, is tacitly acknowledged (b); and Students are admitted Advocats upon Trial of their Knowledge of it.

TIT. V.

The Canon Law.

THE Canon Law is partly confirmed by papal Authority, and partly not confirmed.

1. Those Parts of it which have papal Authority, are, 1. Decretum. 2. Decretales Gregorii 9. 3. Sextus Liber Decretalium. 4. Clementina. 5. Extravagantes Joannis 22. 6. Extravagantes Communes.

[1.] Decretum, which is a Collection of the Decisions and Determinations of Councils, Fathers and Bishops, with Fragments of Glosses and Books of the Civil Law, was composed under Pope Eugene III. in Imitation of Justinian's Pandects, by Gratian a Benedictine Monk of S. Felix, born at Chiusi in Tuscany.

[2.] Decretales, are the Pope's Letters, Referipts, or Edicts deciding Controversies in Ecclesiastick Affairs, which Raymond of Pennefort, a Dominican Chaplain, and Confessor to Gregory IX. did, by that Pope's order, in Imitation

⁽a) Act 80. Par. 6. Ja. V. Act 22. Par. 5. Q. M. Act 699 Par. 6. Ja. V. (b) Act 54. Par. 5. Ja. IV.

tion of Justinian's Code, reduce into a Volume of five Books.

[3.] Boniface VIII. caused a fixth Book of

Decretals to be compil'd.

[4.] Clement V. collected his own Decretals, whose Collection was corrected, finished, and published under the Title of Clementines, from his Name, and his Successor John XXII.

[5.] Extravagantes of John XXII. are some Decretals collected by that Pope, which he (in Imitation of the Imperial Constitutions of Frederick and Henry, extant in the Body of the Civil Law, after the Books de Feudis) called Extravagants of John XXII. because, extra Corpus Juris Canonici quasi vagantur.

[6.] Extravagantes communes, are a Collection of Decretals of the said John, and other Popes, by an unknown Author, which are called, Common Extravagants, because they are not the Constitutions of one, but of several

Popes.

2. The Parts of the Canon Law wanting papal Confirmation, are a feventh Book of Decretals, collected in the Year 1590, by Peter Matthæus, a Lawyer of Lyons; and the Institutes of the Canon Law published in the Year 1563, by John Paul Lancelot, a Lawyer in Tuscany.

3. The Canon Law is owned to be our common Law, by the same Statutes that e-fablish the Authority of the Civil Law, in so

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fo far as our own Municipal Law hath not expressly receded from it (a), or it doth not clash with sound Religion.

TIT. VI.

The Feudal Law.

THE Feudal Law, according to the most probable Opinion, got first up in Lombardy, upon the Suppression of the Civil Law. Where the Lombard Kings, wanting Money to maintain standing Forces, freely bestowed on their Souldiers, according to Quality and Merit, Cities and Lands, with Power to use and enjoy the Profits thereof, for Military Service, referving to themselves the Superi-Which Grants, called Feuda, from the Fidelity and Obedience due by the Receivers, as Vassals to the Granters, were, from small Beginnings, improved in Process of Time, and regulated by private Pactions of Parties, and some unwritten Customs, varying, in diffetent Provinces, according to the different Genius and Circumstances of the People. Feudal Customs were at length confusedly collected into a Volume, mostly out of the Manuscript Scrolls of Gerardus Niger Cappagistus, and Obertus de Orto, both Advocates in the Court of Milan, and Confuls of that City, after their Death, about the Year 1170.

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⁽a) Act 80. Par. 6. Ja. V. Act 22. Par. 5. Q. M.

2. This Collection hath had successively several Editions, whereof some confist of fewer, and some of more Books, variously digested and distinguished into Titles. The vulgar Edition is divided into two Books, the first whereof seems more justly to be ascribed to Gerardus Niger Cappagistus, the first 24 Titles of the second to Obertus de Orto; and the subsequent Titles therein, are a patch'd up Composition, by an uncertain Hand, of the Opinions of Lawyers at that Time. An Edition published by James Alvorate, a Lawyer of Padua, divides these Feudal Customs into three Books, whereof the third begins from the 23d Title of the vulgar Edition. Cujacius makes five Books of the Feudal Customs: Whereof the first three, and a Part of the fourth, comprehend only what is in the vulgar Edition, tho' otherwise distinguished by Books and Titles. The rest of the fourth Book contains extraordinary Heads or Points collected out of Alvorate and Ardizon. An Edition published by Julius Pacius, and another by Dionys. Gothofrede, are the same with the Vulgar, as to the first two Books: But have after the 58 Title of the fecond Book, where the vulgar Edition ends, many Titles out of Cujacius's Edition, and his whole fifth Book. Ugolin plac'd the Books of Feus after Justinian's Novels in the Body of the Civil Law: With which they have pais'd into Universities and Courts of Judicature. Out of these Books, a general Scheme of the

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Feudal Constitutions in Scotland, and other Nations hath been taken, and variously accommodated to the particular Genius of each Country, and the Complexion of their Affairs; there being no such Thing as a common Feudal Law.

TIT. VII.

Old Books of the Law of Scotland.

THESE are the Laws of King Malcom II.

Regiam Majestatem, Quoniam Attachiamenta, and other old Pieces of our Law, which, being originally conceived in Latine, were, by Order of King James VI. translated and published in the Scottish Language by Sir John Skene of Curriebill Clerk Register, who also published these Laws in Latine with his own Notes.

TIT. VIII.

AEs of Parliament, and of Convention of Estates.

A CTS of Parliament are either publick, concerning the whole Lieges; or private, in Favour of particular Persons or Societies. Because such private Acts are made without hearing or calling of those, who may be concerned or suffer Prejudice thereby: For saving every Bodies Interest, an Act salvo Jure cajuslibet, which pass'd of Course, used to be subjoin'd to the Statutes of each Session of Parliament. Acts of Parliament are standing Laws, till they go into Disuse, or be repeal'd.

But Acts of the Convention of the Estates impose only Taxations, and make some interim Regulations for answering the present Exigences

of the Nation.

2. The publick Acts of the Five King James's and Queen Mary, were first printed in an old Gothick Letter, whence they had the Name of the black Acts. Thereafter these Acts were reprinted, omitting some in the black Letter, and continued to the End of the Year 1597, by Sir John Skene. Another Edition of the whole Acts from King James I. till the Death of King Charles II. inclusive, with the Acts of the Conventions 1665, 1667 and 1678, were published by Sir Thomas Murray of Glendoick, and the Acts of King James the Seventh's Parliament, by the Viscount of Tarbet, both Clerk Registers. Which Acts of King James VII. with those of K. W. and Q. M. K. W. and Q. A. till the 25th March 1707, when Scotland and England were united in one Kingdom of Great Britain, to be represented in one Parliament, were printed by Agnes Campbell Relict of Andrew Ander fon.

3. Acts of Parliament generally look forward, and regulate only future Cases: But declaratory Acts, that declare what formerly was Law, look backward; and some upon weighty Considerations, are made expresly with

a retrospect and retroactive Esfect.

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TIT. IX.

Ancient Customs.

A N ancient Custom is a Law not written, established by long Use and Confent. So that it wants the express Sanction of the Legislative Authority, and derives its Force

from the presumed Consent thereof.

2. These Customs are either general or particular. Our general Customs are those of Force all Scotland over: As the Rules and Degrees of Succession; the Right of Primogeniture; the Legitime of Children; Law of Death-bed; Communion of Goods betwixt Man and Wise; and the Division thereof at their Death, the Husband's Courtesy, and the Wise's Terce.

Particular or local Customs are those, peculiar to certain Places: As the Udal Right of

Orkney, &c.

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TIT. X.

AEts of Sederunt, and Decisions of the Session.

A CTS of Sederunt, are Statutes made by the Lords of Session, for regulating the Procedure and Form of administring Justice. These are so called from the Word Sederunt. with which anciently they used to begin, or because they are made by the Lords sitting in Judgment. Decisions of the Lords of Session, sometimes called Practiques, are the Determinations or Resolutions upon particular Points of Right,

Right, or Form contested before them. Which, if they continue uniform for some considerable Time, have the Force of a Law.

TIT. XI.

By-Laws or Statutes of Corporations, or Bodies Politick.

A Ggregate Bodies, as Cities, Universities, Colleges, &c. have Powers from their Charters and Acts of Parliament, to make By-Laws for good Order and Discipline in the Society: Provided these be not contrary or repugnant to the Laws of the Nation. Of this Nature are the Acts of the Convention of Burrows, &c.

TIT. XII.

How the Law of Scotland is distinguished with Respect to the Objects thereof.

THE Law of Scotland, raised upon the Grounds aforesaid, is distinguished into

private and publick Law.

The private Law is that, which confifts of Matters respecting mainly the Interests and Differences of particular Persons among themselves.

The publick Law is that, which primarily regards the Constitution of Church and State, in their Ecclesiastical and Civil Polities, the Punishment of Criminals, and all Disturbers of

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of the publick Tranquillity. Matters of this publick Law being to be handled in the fecond Volume, I confine my felf in this first to the private Law; save that I propound, for Connexion Sake, to add an Account of the Session, the Offices and Officers subservient to it, and of the Commission for Plantation of Churches, Valuation of Tithes, &c. with a general Scheme of the Form of Process observed in these Courts, where all Points of the private Law are agitated and determined.

The Objects of the private Law are, 1. Perfons. 2. Their Estates, and how these are acquired, extinguished, and affected with Burdens. 3. How such may be transmitted and passed over from one to another. 4. The Ways of determining civil Controversies in Point of Right or Possession about them. Of all which I shall treat in Order, as they ly in the sour Parts of this Volume.



B

PART



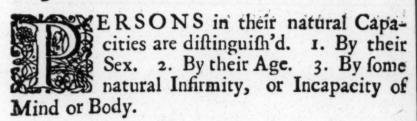
PART I.

Of Persons.

Persons may be considered in their natural, and in their relative or civil Capacities.

BOOK I.

Of Persons in their natural Capacities.



CHAP. I.

Persons distinguished by their Sex.

THE Sex is Male, or Female, or an Hermann maphrodite, i. e. both Male and Female, which is esteemed to be of that Sex, which is most prevailing in the Person.

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In some Cases the Condition of Men is in Law better than that of the Women, in so far as the Latter are removed from the publick Offices of Judge, Magistrate, Advocate, Oca and cannot bear Witness in civil Causes, except where they are necessary Witnesses. In other Cases, Women have Advantage by Law, and their Condition is better than that of Men. Thus a Woman can sooner make a Testament, Marry, or go out of Pupillarity, than a Man. She is not obliged to attend the King's Host; When Males betwixt 60 and 16 are called out.

CHAP. II.

Persons distinguished by their Age?

A L E and Female have divers Ages to several Purposes, in which they have more or less Power given them, viz. Impuberty, or Pupillarity; Puberty, or Minority; and Majority, or perfect Age.

Those who have the Inspection of Persons under Age, or their Fortunes, are, 1. Tutors and Curators, properly so called. 2. Quasi Tutors and Curators.

Pupillarity in Males continues till 14, and in Females till 12 Years of Age: That is, Law subjects them, during that Period of their Life, to the Care of Tutors.

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TIT.

TIT. I.

Of Tutors, and the feveral Kinds of them,

1. A Tutor, (so called a Tuendo) is one, who hath a Power and Faculty to govern the Person and Estate of a Pupil, whom Law supposes incapable to manage himself aright. The Tutor's Office is term'd Tutory, or Tuition.

2. Tutors are of three Sorts. 1. Nominate or Testamentary Tutors. 2. Tutors of Law.

3. Tutors Dative.

[1.] Tutors Testamentary are those named by the Father in Testament, or some other Writ, in Virtue of the Paternal Power: For tho a Tutor be named in any other Writ than a Testament, the Nomination is of a Testamentary Nature, and alterable at any Time, during the Father's Life: The Mother, or other Person, who gives any Thing to a Child, may also name Tutors for managing what is disponed, during the Child's Pupillarity.

[2] Tutors of Law, are either extraordinary, who are given to Idiots and furious Perfons, &c. of which hereafter (a), or ordinary, who are given to Pupils, upon account of their Nonage. If there be no Tutor Testamentary, or, if the Person named accept not, the nearest Agnate or Kinsman by the Father's

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⁽a) Vid. infr. Ch. 3. Tit. 1.

Side, who is 25 Years of Age, and would be Heir to the Pupil, may succed to the Office by Law (b), who is therefore called Tutor of Law. 'Tis the next Male Agnate: For a Woman, tho' fhe would be Heir to the Pupil, failing his own Children, cannot be ferv'd Tutor of Law One may be ferv'd Tutor of Law. to him. before any Judge, upon a Brief out of the Chancery, tho the Pupil live not within his Jurisdiction: And the Service being retoured to the Chancery, a Nomination of the Tutor is given out; which is a fufficient Title of Administration. This Service must be expede within Year and Day, from the Time such a one is capable to be Tutor.

A Father is Tutor of Law to his own lawful Children, without being authoriz'd by a Service; but is Tutor to his natural Children, only for managing what flowed to them from

himself.

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[3.] A Tutor Dative is he whom the Sovereign Appoints by a Gift under the quarter Seal, where the Tutor of Law neglects to ferve within a Year after he might have done it. One defiring to be Tutor Dative, gives in a Signature to the Exchequer: In passing whereof Regard is had to the Pupil's Interest, in bestowing the Office on a Person supposed to be most careful: For which End the Pupil's nearest Friends by Father and Mother, are to be previously

⁽⁴⁾ Act 52. Par. 7. J. III,

procured (a).

Part I.

3. The three Sorts of Tutors aforefaid, differ in the following particulars. 1. A Tutor Testamentary is capable to act, by Virtue of the simple Nomination, tho' the Testament be not confirmed, without being obliged to find Surety, Rem Pupilli Salvam fore, or to give his Oath de fideli Administratione. But Tutors of Law must find Caution before they act: And Tutors Dative should both find Caution, and make Faith de fideli, tho' that Oath be never required. 2. A Tutor Testamentary is always preferred to the Tutor of Law, or Tutor Dative, but Differences about Preference to the Office cannot be compromis'd or taken away by Arbitration. 3. A Father may, in his Liege Poustie, name Tutors to his Children, with this Quality, That they shall neither be liable for Omissions, nor yet in solidum (b). But fuch a Quality in the Service of the Tutor of Law, or in the Gift of a Tutor Dative, would not profit him. 4. The Custody of a Pupil's Person, after seven Years of Age, belongs to a Tutor Testamentary or Dative; but not to a Tutor of Law.

4. All Tutors act generally themselves for

the Pupils, without their Concurrence.

5. Af er the Years of Pupillarity are run out, those who were formerly under the Conduct of Tutors Tuto

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⁽⁴⁾ Act 2. Par. 2. Seff. 3. Ch. II. (b) Act 8. Seff. 6. Par.

Tutors, change the Name of Pupils for that of Minors: Tho' the Word Minor be also frequently used, to denote any Person under twenty one Years of Age, whether over or un-

der Pupillarity.

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6. Minors, after Pupillarity, get the free difposal of their own Persons, can make Wills, Marry, and are punishable for Crimes or Trespasses. But Law allows the Assistance of Curators to Ballance their Levity and want of Experience in Civil Affairs, till they are of Perfect Age, which is twenty one Years complete.

TIT. II.

Of Curators, and the several Kinds of them.

Curator, (from Cura) is one, who hath a Power or Faculty to manage the Affairs of others, who are held uncapable to do for themselves.

2. Curators are either Extraordinary, or Or-

dinary.

Extraordinary Curators are, 1. Those given by the Sovereign to manage controverted Estates. 2. Curators given to such as cannot order their own Matters upon the Account of fome Infirmity of Body or Mind; of which hereafter.

Ordinary Curators, are either Curators ad

Lites, or Curators ad Negotia.

[I,] A

[1.] A Curator ad Litem, is one appointed to authorize some civil Action or Suit, at the Instance of, or against a Pupil or Minor, having or wanting Tutors or Curators, who is given by the Judge before whom the Action is pursued, at the Desire of either Party. This Curator is not bound to find Caution for the Minor's Indemnity: Because, he doth not intromet with any of the Minor's Effects, and his Office extends only to the Process for which he is authorized, the Event whereof mostly depends upon the Justice of the Minor's Claim.

[2.] Curators ad Negotia, are so called, because, they're mainly designed for administring the Minors Extrajudicial Affairs; not but that they may, and are obliged to authorize the Minor in civil Actions; Curators ad Litem being calculated only to serve a Turn for want of

those.

3. Curators ad Negotia, are either Curators of Law, or Curators nominated, or Curators

elected.

[1.] Fathers are Curators of Law to their Children, and Husbands to their Wives. But in this, a Wife is in a different Case from an ordinary Minor, that his Curator's Office is at an End, when the Child is Twenty One; whereas Curatory over a Wife dissolves only with the Marriage. Again, she cannot oblige her self for Sums, even with her Husband's Consent; but can grant Rights to her Husband

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or to any other for his Behoof; if ratified in his absence before a Judge.

[2.] Curators nominated, are, Curators named by a Father in liege Pouftie to his Children, whom he may appoint with this Quality. That they shall not be liable for Omissions. Nor are these Curators bound to find Caution,

unless their Condition alter (a).

[3.] Curators elected, are those whom the Minor chuses for himself, by Way of Process at his Instance, wherein some two or three of the nearest of the Father's and Mother's Friends being cited upon nine Days warning, and all others having Interest, generally at the Market Cross of the head Burgh of the Jurisdiction, where the Minor's Lands ly, to compear before the Minor's Judge Ordinary, to hear and fee Curators decern'd to him. The Minor, at the Day, gives in a List of those he desires, who, if they accept, must subscribe their Acceptance upon the figned Nomination given in by the Minor, make Faith, find Caution de fideli administratione, and make Inventories of the Minors Writs and Estate. Upon all which the Clerk extracts an Act of Curatory (b). Curators are not to be chosen before the Tutory expire, and if they be, the Act of Curatory is null.

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sationed for the civil Debts are un-

a) Act 8. Seff. 6. Par. K. W. (b) Act 35. Par. 6. Q. M. junct. Act. 2. Par. 2. Seff. 3. Cb. II.

4. Curators do not act for their Minors, as Tutors do for their Pupils, but they Act with them, and consent to their Deed.

Having spoke of Tutors and Curators sepa-

rately, I shall now treat of them jointly.

TIT. III.

What is common both to Tutors and Curators, and peculiar to either.

WHEN several Tutors or Curators are named, so many of them are often appointed a Quorum, that is, their joint Concurrence to be necessary to make Deeds subsist in Law, and sometimes one or more of them to be sine quo, or sine quibus non, that is, whose Consent must be had to all their Deeds.

SECT. I.

Who may be Tutors or Curators, if any are bound to accept the Office, and what is Acceptance.

1. A N Y Person may assume the Office, whom Law hath not debarr'd expressly, or by necessary Consequence. In general, all are excluded from it who are incapable to perform the Duties thereof. Such are Minors, Fools, surious and interdicted Persons, Papists (a), and Rebels at the Horn for civil Debt, are disqualified to be Tutors or Curators. Women may

(a) A& 8. Par. 1. Seff. 1. Cb. II.

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2. Those, who are qualified for the Office, are free to accept or refuse the same. Yea, Perfons named by a Father in his Liege Pouftie to be Tutors and Curators, may accept the Office of Tutory, and decline to be Curators as they please (a). Nor are Tutors or Curators they please (a). liable as such, but from the Time of their Acceptance. But if a Legacy be left to a Tutor or Curator nominated, he must either accept the Office, or want the Legacy; whether the Bequest was made in Contemplation of his Acceptance, or abstractly without any such View. Acceptance is either express, when the Tutor or Curator compears, and formally embraces the Office; or it is tacit, and prefumed from some Act inferring the same, as subscribing Writs for the Pupil as Tutor. If several Tutors or Curators be named jointly, all must accept; or if so many be appointed a Quorum, that Quorum must accept, otherwise the Nomination is void. Where they are named without the Word Jointly, or any Quorum expressed, the major Part must accept to make the Nomination subsist. If more Tutors or Curators be named jointly and severally, the Nomination is good, if any one accept. Where a fine quo non is named, and he refuses to accept, the Nomination falls.

SECT.

SECT. II.

The Duties of Tutors and Curators, what they, their Factors and Cautioners are liable to.

1. SOME of the Duties of Tutors and Curators are previous to their meddling with the Minor's Fortune; others respect the Ad-

ministration it felf.

2. The Preliminary Duties are, 1. The making Faith, and finding Caution to act to the Minor's Advantage, which Tutors Dative, and Curators not named by the Father in his Liege Poustie are liable to. But Tutors Testamentary, and Curators so named by the Father, do neither; and a Tutor of Law only finds Caution. 2. All Tutors and Curators must compile an Inventary of the Writs and Estate, before they enter upon the Administration, and add to the same what afterwards comes to their Knowledge, within two Months after their attaining Possession of the same, otherwise Debtors are not obligid to pay to them (a).

3. The Duties of Administration concern,
1. The Custody of the Pupil's Person, his
Maintenance and Education. 2. His Fortune

and Affairs.

[1.] The Mother, while she continues a Widow, has the keeping of the Pupil till the Age

(a.) Act 2. Par. 2. Seff. 3. Ch. II.

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Age of seven Years, and sometimes longer in special Cases. But ordinarily the Custody of the Pupil, after seven Years of Age, belongs to a Tutor Testamentary or Dative, the not to a Tutor of Law; and even of an Insant, if the Mother be dead, or married to a second Husband. Upon the Tutor's Application, an Aliment will be modified to the Pupil suitable to his Fortune, and if that be omitted, the Tutor will be allowed only what he can instruct to have expended upon that Score, not exceeding the Annualrent of the Pupil's free Stock.

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[2.] Minors must be authoriz'd by their Tutors and Curators in all Actions of Law, wherein they are either Pursuers or Defenders. When Minors are pursued, it sufficeth to cite them personally, or at their dwelling Place; and their Tutors and Curators, if they any have for their Interest, generally without naming them at the Market-Cross of the Head Burgh, where the Minor dwells. Upon which they may be decerned with the Minors for their Interest, and personal Execution will by against them during their Office for any Deeds prestable by the Nature thereof, or for making Forthcoming so much of the Minor's Money, as they are decerned to pay.

[3.] Tutors or Curators are not to suffer the Minor to uplift his own Rents, lest he mispend and squander them away. And if any Co-Tutor or Co-Gurator act unaccountably, or without Consent of the rest, these should get

him

him remov'd from his Office as fuspected and

maleverfing.

[4.] For making Debts due to the Minor effectual, a Tutor or Curator is liable to do exact Diligence. He should use Adjudication, Poinding, or Arrestment, according as the Subject of the Debtor's Estate is affectable by Diligence. If there be nothing to adjudge, poind, or arrest, personal Execution by Horning and Caption is to be used. But Tutors or Curators are not bound to do Diligence, except where the Minor may find his Account therein, by recovering the Debt.

[5.] Money due or belonging to the Minor, before the Tutory or Curatory, if then bearing Annualrent, must be kept always employ'd upon Annualrent; if not then bearing Annualrent, must be laid out at Interest, within a Year after the Tutor or Curator's Acceptance of

the Office.

[6.] As to Rents falling due to the Minor during the Tutory or Curatory, the Money Rent of Lands should be put out at Interest, within Half a Year after the Term of Payment, and Victual Rent within a Year, in so far as the same are not otherwise necessarily expended. A Year is also allowed to reimploy principal Sums uplisted by Tutors and Curators. But they are oblig'd only to take in the Minor's Annualrents out of secure Hands, and stock them in a principal Sum once during their Office, bearing Interest from the expiring thereof.

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[7.] Regularly Tutors and Curators are accountable in Solidum to the Minor, both for Intromissions and Omissions: And are bound to relieve one another pro Rata. But a Father is impowered to name, in his Liege Pouftie, Tutors and Curators to his Children, with this Quality, that they shall not be liable for Omisfions, or in Solidum, but only each for himself (a):

[8.] A Tutor continuing to administer after clapfing of Pupillarity, is liable as a Curator for Omiffions. But a Curator, who continues to uplift Rents after Majority, is answerable only for his actual Intromissions, as Negotiorum

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9. Factors, having general Factories, are hable to the Minors, in the same Manner, as their Constituents. But Cautioners for Tutors or Curators cannot be fued, till the Principals be discussed.

SECT. III.

The Powers of Tutors or Curators.

1. FOR clearing and fixing the Boundaries of a Tutor or Curator's Power, I shall first point out what they cannot do, and then what is within their Sphere.

2. Some Things both Tutors and Curators are absolutely prohibited to do; others Tutors

cannot

(a) Ad. 8. Seff. 6. Parl. K. W.

cannot do without the Authority of the Lords

of Session interposed to the Deed.

3. Neither Tutors, nor Minors with Conlent of their Curators, can gift away the Minor's Effects. Nor can any Tutor or Curator be Author in Rem Juam, by authorizing the Minor to do any Deed tending directly to the Authorizer's Advantage, as to become bound for him to a Third Party: But he may authorize his Deed tending immediately to the Minor's Advantage, tho' in Confequence it be profitable to the Curator himself. Tutors or Curators cannot fet Tacks to run longer than their Office, tho' thefe were no ways prejudicial to the Minor. Nor should they attempt any Thing that's hazardous, or buy Land with the Minor's Money. Tutors eannot fell or wadfet the Pupil's Heretage, or heretable Rights, without the Lords Authority interposed in a Process, wherein his Creditors and nearest of Kin are called to hear and fee it found and declared, that there is a Necessity to fell some Part, and to hear the Price determined. a Tutor wants not such a Sentence to impower him to renounce a Wadlet Right belonging to his Pupil, because he may be forced to it; nor to grant Infeftment in his Pupil's Lands in Implement of the Father's Obligement.

4. Tutors and Curators have active Powers to fet or labour the Minor's Lands, uplift his Rents or Annualrents, or principal Sums not well fecur'd; to carry on any Work left to the Minor.

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Minor, which cannot be otherwise disposed of a to imployhis Money at Interest in good Hands, or upon Land Security; to pay his Debts, and clear his Estate of Burden; to appoint Factors to act in their Room, and give them reasonable Salaries.

tory, enter, brevi Manu, to the Minor's Lands posses'd by the Tutor; and meddle with the growing Corns sown by him. And tho' the Authority of the Lords be necessary to a Tutor's Alienation of his Pupil's Lands; a Minor may, with Consent of his Curators, essectivally sell his Lands, without the Warrant of a Judge.

6. Where there are several Tutors or Curators nam'd jointly, all must concur in the Management to make it subsist; or, if so many be appointed a Quorum, that whole Quorum must act. Where they are named without the Word jointly, or any Quorum express'd, the major Part must concur. If more are named jointly and severally, any one by himself can act or authorize. Where one or more are named sine quo, or sine quibus non, his or their Consent should always be had.

SECT. IV.

The Effect of a Tutor or Curator's Administration

quires of what belongs to his Pupil, is prefumed to be acquired with the Pupil's Means; and so accrueth to him, tho taken in the

Tutor's own Name. The Oath of a Tutor is sustained, to prove against his Pupil the Tutor's own Fact, as the Quantity of Rents intrometted with by him in the Pupil's Name. But the Tutor cannot be held as confest thereon, for refusing to depone as a Party, but must be put to it by Horning and Caption, as a Witness.

2. A Tutor or Curator's Administration produceth Action betwixt the Minor and third Parties. It subjects also the Tutors or Curators, and the Minors to mutual Actions of Compt and Reckoning; the one at the Instance of the Minor, called Actio Tutela directa, if levelled against Tutors, and utilis curationis Causa actio directa, if against Curators; the other at the Instance of Tutors, called, Actio Tutela contraria, and at the Suit of Curators, called, Utilis Curationis Causa Actio contraria.

3. Actio Tutela directa, is a personal Action competent to a Minor and his Heirs after Pupillarity, against his Tutor and his Heirs, that he may account for his Administration, and restore what he hath belonging to the Minor.

4. Utilis curationis Caufa Actio directa, is competent to Minors, against their Curators, after expiring of their Office, for clearing Accompts betwixt them, and divesting the Curators of their Minor's Rights and Effects.

5. In which Actions, one of more Tutors or Curators may be conveened, without infifting against the rest; all being liable in soliCh.

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2. An End is put to the Office by the Sentence of a Judge, that is, the Lords of Session, (a), either for the Minor's Fault, or for the Fault of the Tutor or Curator. For the Minor's Fault, when he being irregular, or unmanageable, and resusing to follow the Advice of his Curators, they pursue an Exoneration. For the Fault of the Tutors or Curators, when they are removed by a Process, as suspected of managing of the Minor's Affairs treacherously, or having an Intention to do so, for not having made Inventory of the Minor's Writs and Estate (b), or found Caution,

TIT. IV.

Quafi Tutors and Curators.

Quasi Tutors and Curators, are, 1. Persons named to be only Checks upon the Management of Tutors and Observators of their Administration, term'd therefore, Honorary Tutors or Overseers, who are not liable at all to the Minor, unless they intromet with his Effects; nor to accompt for more than they intromet with. 2. Another Sort of quasi Tutors, are those, who, without a lawful Call, do meddle in the Minor's Affairs, as Tutors or Curators; whence they are term'd, Protutors, or, Procucurators. These are liable in all Points as Tutors

(a) Act 35. Par. 6. Q. M. (b) Act 2. Par. 2. Sel 3.

tors and Curators (a). And in Effect are such

passive, but not active,

As Minors have the Benefit of being under the Care and Conduct of Curators; So they have many Privileges.

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The Privileges competent to Minors.

Some Privileges are competent to Minors only in the State of Minority, others

even after they become Majors.

2. Privileges competent to Minors while under Minority, are these following, 1. They're exempted from personal Execution by Caption or Warding for Debt, or any civil Cause, during their Pupillarity (b). 2. The legal Prescriptions, except three Years Prescriptions of Actions of Removing, and of Debts not sounded on Writ (c), run not against Minors. 3. The Legal of Apprisings or Adjudications doth not run against them (d), and during their Minority they're obliged only for the Annualrent of the Sums in the Apprisings (e). 4. Non tenentur placitare super hareditate paterna (f), they are not obliged to answer any Process that may evict Heritage or Conquest possess'd by them, as succeeding immediately

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⁽a) Act of Seder. 10 June 1665. (b) Act 41. Sest. 6. Par' K. W. (c) Act 82, 83. Par. 6. Ja. VI. (d) Act 6. junct Act 7. Par. 23. Ja. VI. (e) Act 10. Par. 1. Sest. 3. Ch. II' (f) Stat. K. W. c. 39.

Ch. 21 Law of Scotland. Tit 3. 6 4- 35

dum to the Minor. But these Actions against their Tutors and Curators are not competent, till after the Ish of their respective Offices.

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6. Actio Tutela contraria, is competent to Tutors, and Actio utilis Curationis Causa contraria, to Curators, after expiring of their respective Offices, and clearing their Accompts, against the Minors, to restore and make up to them the profitable Expences laid out by them, in Profecution of their Trust on the Minor's Accompt. But Tutors or Curators are to expect no Reimbursement of their Expences in the Minor's Affairs, if they have not made Inventaries in the Terms of Law (a), tho' necessarily bestowed in Pursuits, or legal Diligences, but only Allowance of what they expended on the Minor's Entertainment, or upon his House and Estate (b). Tutors or Curators have no Salaries by Virtue of their Office : And if Salaries be appointed to them by the Person who names them, these are understood to be in lieu of incident Charges. But none of these Counteractions can be purfued by Tutors or Curators. till after they have clear'd their Accompts with the Minor. Because, till then, they are prefumed intus babere, to have fufficient Effects of the Minors, to answer all Demands on their Part. And they but rarely occur: Because, a Tutor, or Curator, when pursued in the direct Action of Compt and Reckoning, may get

⁽⁴⁾ Act 2. Par. 2. Seff. 3. cb. II. (b) Act Seder. 25ths

Allowance of what he could recover by his contrary Action.

SECT. V.

How Tutory and Curatory ends.

TUTORS, and Curators, after they have once accepted the Office, cannot renounce it: But it expires either ipso jure, or an End is put

to it by Sentence of a Judge.

1. The Office expires by the Effect of Law, 1. When the Minor arrives at fuch an Age. Tutory continues no longer than Pupillarity, that is, 14 Years in Men, and 12 in Women. Curatory expires at the Period of 21 Years in both. 2. The Office expires by the Death of the Minor, or of his only Tutor or Curator. if more be in the Office jointly, it falls by the Death of any one; or if a Quorum named be broke by the Death of fo many, as that fuch a Number is not left behind, the Nomination becomes pull. Where Tutors or Curators are named without the Word jointly, or any Quorum express'd, the Office falls by the Death of the major Part: But if they be named jointly and severally, tho' all should die, save one, the Office subsisteth in that one surviving. Where a fine quo non is named, his Death voids the Nomination. 3. The Office expires by the Marriage of a Female Minor, or the fecond Marriage of a Mother, who is Tutrix to her own Child.

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to any afcendant in the right Line, who died in the peaceable. Possession by Virtue of Infestments, whether the Minor's Right be principally quarrelled, or only confequentially, as depending upon the Right of one who is Ma-But then Process will be sustained without delay against the Majors Right, notwithstanding the Contingency with the Minor's Interest. This Privilege is competent to Minors against Minors, as well as others: doth not hinder a Minor to implement his Father's Obligement to denude of the Estate, or to Answer in possessory Actions concerning Marches or division of Lands, or in a proving the Tenor of a Writ exclusive of the Minor's Right. Neither doth it bar the Superior to pursue for his Casualities, nor avail a Minor, whose Father's Right is quarrelled upon his Fraud, or by Improbation, Forfeiture, or Recognition for his, or his Authors Crimes or Trespasses.

3. The Privilege competent to Minors after their Minority, is the Benefit of being restored against what was done to their Prejudice by their Tutors, or by themselves, with or without Confent of Curators. Some of these Deeds against which a Minor is reponed, are ipso jure null by Exception, as a Tutor's Alienation of his Pupils Heritage without a Warrand of the Lords; and the felf prejudicial Deed of a Minor having Curators without their Confent. Others are quarrelable only in the

Way of Reduction, as a Deed done by a Minor wanting Curators, to his Hurt, In order to reduce a Minority Deed, the Minor may raise and execute a Reduction before he be twenty five Years of Age. For the twenty one Years be the Term of Minority, four after, called anni Utiles, or Quadriennium Utile are allowed to commence Reduction therein, with, or without a previous Revocation. which Action the Purfuer must prove Minority at the Time of the Deed, and that he was lesed or wronged thereby, whether in judicial or extrajudicial Affairs. The Benefit of Restitution in integrum upon Minority and Lesion, is competent also to the Minor's Heir, who, if he be also Minor, may reduce the Deed of his Predecessor dying in Minority, at any Time before he himself be twenty five Years of Age. But a Person becoming Cautioner for a Minor as fuch, is nothing profited by the Minor's being restored.

4. This Privilege of Restitution ceaseth, where the Minor deceives the Person who Contracts with him, by calling himself Major: or either expressly ratifies or homologates the Deed after his Majority; or is lesed in the Matter of his own Profession or Imployment, as when a Lawyer is over-reached in Point of Law, or a Merchant in a Mercantile Affair. But a Minor's swearing to adhere to the Deed, Joth not hinder it to be declared youd at the In-

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Deed, t the InInstance of any Person related to the Minor, and the exacter of the Oath infamous (a).

CHAP. III.

Persons differenc'd from others by some Incapacity of Mind or Body.

DIOTS, Madmen, dumb and deaf Perfons, are, for their Safety, put under the Conduct and Management of Tutors and Curators; and prodigals are restrained from squandring away their Fortunes by Interdiction.

TIT. I.

Tutors and Curators of Idiots, furious Persons, &c.

The Father's Side of Idiots or furious Persons (b), or such as are Dumb and Deas,
are Tutors and Curators of Law to them.
Who may be served at any Time by an Inquest
upon a Brief of Idiotry issued forth of the
Chancery. In appointing such Tutors, the
full Blood is preserred to the half Blood, according as they have Right to succeed to the
Idiot's Estate. Reduction of Deeds of Idiots,
or surious Persons, is essectual from the Time
the Granter is found by the Inquest to have
been in such a State of Insirmity (c). The

⁽a) A& 19. Par. 3. Ch. II. (b) A& 19. Par. 10. Ja. VI.

Office of fuch Tutors expires not by their Pupil's having lucid Intervals, but when they

fully recover their Senses.

2. Where the next Agnats ferve themselves Tutors and Curators of Law to Idiots and furious Persons, Tutors Dative may be named by the Exchequer, or Tutors and Curators by the Father. A legal Administrator will exclude the next Agnat: For a Father is Administrator to his Idiot, or furious Child, and a Husband to his Wife who is an Heirels.

TIT. II.

Of Interdiction.

Nterdiction is either voluntary or judicial. 1. Voluntary Interdiction is a Writ, whereby a Person, sensible of his own Extravagancy and Mismanagement, obliges himself to do nothing without Consent of some Friend or Friends therein mentioned, called Interdictors. Such a Bond of Interdiction made by a Perfon who wants the Solidity requifite to negotiate his own Affairs, is good, albeit the Granters Incapacity is not flatly narrated: And where it is narrated, the Bond may, without Regard to such a Narrative, if not true, be reduced.

2. Judicial Interdiction is a Sentence of the Lords of Session, discharging a Person known to be of extravagant Profuseness, and obnoxious

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BOOK II.

Of Persons in their relative or civil Capacities.

PERSONS may be confidered either in General, or more Particular relative or civil Capacities.

CHAP. I.

Of Persons in General relative or civil Capacities.

PERSONS in a general relative of civil Capacity, are the King and his Subjects.

2. Subjects are either those of the Royal Family, as the Queen Consort, the King's eldest Son; or ordinary Subjects. But the King having both a private and publick, or politick Capacity, and the Queen by the common Law being a publick Person, and the King's eldest Son (now styled Prince of Great Britain) having an Appanage or Patrimony in Scotland, erected in a Jurisdiction, called The Principality, with his Chancery and Officers of State, as Advocate, Justice-General, &c. An Account shall be given of these in the second Volume concerning the publick Law.

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3. Ordinary Subjects are 1. Perpetual or Temporary. A perpetual Subject is 1. A natural born Subject, that is, one who is born under the Allegiance of the King, or the Child of fuch a Subject, tho' born out of the Allegiance of his Majesty (a). 2. One who hath the Right of a Subject by Denization or Naturalization. Denization is an Infranchisement by the King's Letters Patents. Naturalization is a Right of a Subject given by Act of Parliament. A temporary Subject is an Alien, or one born out of the Allegiance of the King, residing in his Majesty's Dominions, who oweth Allegiance to his Majesty, so long as he is within his Protection. Ordinary Subjects are divided, 2. Into the Clergy and Laity.

Of the Clergy.

THE Clergy, are those set apart for the Ministry and Service of God. They are so called from the Greek Word Κληρος, a Lot, or Portion; either, because these are the Lot or Portion of the Lord; or, because the Lord is their Lot and Inheritance; or, for that anciently, both among the Jews and Gentiles, Persons us'd to be chosen into sacred Offices by Lot. The Clergy of Scotland have, in different Periods of Time, been of different Denominations and Characters.

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to be easily cheated, to act without Advice and

Consent of certain Interdictors.

3. In order to put all Persons in mala fide to deal with such as are interdicted, the Lords issue forth Letters of Publication, to be execured or ferv'd (not against the interdicted Party himself) but only at the Market Cross of the head Burgh of the Jurisdiction where he lives. and to be recorded within 40 Days thereafter. either in the particular Register of that Jurisdiction, and also where his Lands ly, if these and the dwelling Place be within different Difiricts (a), or in the general Register at Edinburgh (b), otherwise the Interdiction is null. Registration in the general Register affects all his Lands within Scotland; but Registration in the particular Register, affects no Lands without that Jurisdiction.

4. Deeds of an interdicted Person alienating Heritage to his Hurt, without Concurrence of the Interdictors, are reducible ex capite Interdictionis, at the Instance of himself, his Heirs or Assigneys, or Creditors, or even at the Suit of Interdictors without his Confent. But the interdicted Person may grant personal Obligements, or dispose of his Moveables, and make

profitable Bargains about his Heritage.

5. Interdictors being appointed only to authorize the Deeds of the interdicted, are not liable to Diligence. They may authorize him

⁽⁴⁾ Ad 119. Par. 7. junch, Act 264. Par. 15. 94. VI. (6) Act 13. Par. 16. Ja. VI.

to gift away or gratuitously to affect his Heritage; tho a Curator could not so authorize his Minor. But it sufficeth not to support his Deed without the Interdictors Consent,

that they subscribed Witnesses to it.

6. Voluntary Interdiction is dissolv'd, 1. By Consent of the prodigal Person and his Interdictors, if he turn srugal and provident, or was interdicted without just Cause. If in either of these Cases, the Interdictors resuse voluntarily to repone him to the free disposal of his Fortune; the Lords, upon a Bill presented to them, will causa cognita, take off the Interdiction. 2. Where a certain Number of Interdictors is declared a Quorum, the Interdiction falls, if so many die, as that Number survives not.

7. Judicial Interdiction lasts till the Party is declared by Sentence of the Lords to have been interdicted without a just Cause, or to be no longer subject to that Levity, and Prodigality, which occasioned his being inter-

dicted.



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Of the Clergy in Time of Popery.

WHILE Popery swayed here, there was both a Regular and Secular Clergy, who all own'd the Pope as their Spiritual Monarch.

1. The Regular Clergy were the Monks, who lived in Monasteries, so called, because put under the Ties of Vows, and Rules of Mortification and Devotion, according to their feve-Their diftinral Orders and Institutions. guish'd Offices were Abbots, Priors, and Subpriors. The Abbot was he in whom the chief Care and Management of the Religious House was lodged. The Dignity of an ordinary Abbot, is next to that of a Bishop. Some Abbots were independent of Bishops, and therefore called Abbates exempti; others were invested with Episcopal Power, who had the Name of Sovereign Mitred Abbots. Priors were either dependent or independent. Dependent Priors were either Claustral, or Conventual. A Claustral Prior held Rank in the Monastery next to the Abbot, and govern'd during his Absence, or a Vacancy of the Office: As a Sub-prior supplied the Office of Prior in the like Circumstance. A Conventual Prior, was one who presided over a Party of Monks detach'd out of some Monastery, and settled in a distinct Place called Cella, or Grangia, or Obedientia, to look after remote Lands and Rents belonging to the MonaMonastery. An independent Prior was the Head of a Religious House, call'd a Priory, not depending upon any Monastery. Some of which Priories had lesser Priories in other Places belonging to them.

2. The Secular Clergy were distinguish'd into Orders and Dignities, or Prelacies. Some of these Orders were called Minor, as Door-keepers, Readers, Acolytes and Exorcists. Others were named greater Orders, as Priests, Deacons and

Subdeacons. [1.] The Priests, or Under-Clergy were difpoled into Parish Churches, or Chappelries, or had their Posts assign'd them at Altars, or in Chappels of Cathedral, or Collegiate Churches, Some Parochial Priests were called Parsons, others term'd Vicars. Parsons were Incumbents, who possest the Benefices called Parsonages, by Virtue of their own immediate Some of these Incumbents were proper Parsons, that is, who perform'd the Sacred Function; others were only representative Parfons, who supply'd the Cure by the Help of Vicars, as Parlons not qualified to ferve, for being Laymen, or who had Pluralities, or were infirm, or Collegiate or Cathedral Churches who had Right to the Parsonages, and gave a small Salary to their Vicars. Some of these Parsonages belonged to the Prelate as Parson, or Titular, called Mensal Churches, because allowed for maintaining his Table, whereof he ferv'd the Cure by a Substitute put in by himfelf

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felf. Others belong'd to the Chapter in Common. in the planting whereof the whole Members had a joint Interest: Whence these were term'd Common Churches. So that Vicars were the Priests of Parishes, whereof the Tithes were appropriated to a Prelate, or religious House, or impropriated to Lay-men. Parish Churches were either free Churches, or those under Pas tronage. Free Churches were fuch, as the Incumbent got Right to pleno Jure, by Collation and Institution. Churches under Patronage. were those to which Persons who had either endowed, or built them, or given the Ground to build on, called Patrons, were impowered to present Ministers for supplying the Cure, and enjoying the Benefice. Which Patrons had also other Privileges, as a splendid Scar, and Burial Place in the Church, Disposal of the Fruits of the vacant Benefice, a Right of Precedency among the Clergy in folemn Processions, and to be alimented by the Church, if reduced to Poverty. Nor could the Benefic'd Person, without Confent of his Patron, do any Thing material, fuch as the granting of Feus, Oc. 10 years

[2.] The Dignities we had in Scotland were those of Primate or Metropolitan, Arch-Bishop, Bishop, their Subalterns, and Provosts. The Metropolitan, and Arch-Bishop, presided over whole Provinces, differing only in this, that the former was the more honourable Arch-Bishop, having his Seat in a Metropolitan City. Bishops had both a spiritual and civil Jurisdiction with-

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in their own Diocies; and each had his own Official to judge in confistorial Matters, and confirm Testaments. In the Room of these Officials, Queen Mary appointed Commissaries. The Bishop's Parish Church was term'd a Cathedral. In every Cathedral there were fome collegiate Canons, or Prebendaries, with a Dean over them, who made up the Bishop's Chapter or Council. The dignified Members thereof, were, the Dean, Arch-Deacon, Chanter, Chancellor, and Treasurer. The Dean presided over the Prebendaries, and the Arch-Deacon was in Effect the Bishop's Vicar. The Chanter was Rector of the Choir, who fung the Mass. The Chancellor was Secretary to the Chapter, and kept the Seal thereof. The Treasurer had the Custody of all Things belonging to the Church, and had under him a Sacrift, or Vestry Keeper. Provosts were, either Governours of Colleges instituted for the Education of Youth; or had the Inspection of collegiate Churches, consisting of Prebends, or Canons, instituted for Divine Service, and finging of Mass for Souls.

SECT. H.

Of the Protestant Clergy.

1. A BOUT the Dawning of the Reformation, after abolishing of the Pope's Jurifdiction, in the Year 1560, we had ordinary Ministers distributed among the Burghs, and Superin-

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Refors Jurifary Miand Superinperintendants of Shires, ordained for Administration of Church Affairs. In the Year 1592, Presbyterian Parity was established by Law, and all Prelacy, or Superiority of any Office in the Church above that of a Presbyter, abolished (a).

2. In the Year 1606, Arch-Bishops, and Bishops of Cure were restored (b). And in the Year 1612, full Power was given to these Bishops, for Ordination, and Church Rule (c), but no civil Jurisdiction. Prelates were thrust out in the Year 1638, and Presbytery reviv'd. But were restored in the Year 1662 (d), confifting of two Arch-Bishops, and 12 Bishops, who were elected by the Chapter of the See they were delign'd for, upon a Writ from the King, called a Conge d' Estire; that is, A Power to elect, and an Edict affix'd on the most patent Door of the Cathedral, charging the Chapter to convene for Electing. The Chapter's Election under their Seals being return'd, the King granted a Patent to the Perfon elected, carrying a Right to the Revenue. which pass'd thro' all the Seals; and a Mandate to three Bishops at least, for his Consecration, which pass'd only the great Seal per saltum (e). The Formality of admitting the inferior Episcopal Clergy was, by Presentation to the Bishop, and Collation from him, and Dia Da

⁽⁴⁾ Act 116. Par 12. J. VI. (b) Act 2. Par. 18. J. VI. (c) Act 1. Par. 21. J. VI. (d Act 1. Par. 1. Seff. 2. Cb. II. (c) Act 21. Par. 22. J. VI.

Institution: Unless where the Bishop, as Patron, conferr'd pleno jure. In which Case, the Presentation and Collation were the same.

3. In the Year 1689, Prelacy was again abolished (a). And in the 1690, Presbyterian Government re-established (b.), and the Power of Presentation of Ministers by Patrons discharg'd; for which a valuable Consideration was ordained to be given to the Patrons, besides a Right they got to Tithes not heretably disponed (c). But now, Patrons, who had not formally renounc'd their Power of Presentation, are restored to it (d).

4. In Presbyterian Government, there are only three Orders of Ecclefiasticks, viz. Minifters, Ruling Elders, and Deacons. The Office of Ministers is to preach, administer the Sacraments, catechife, pronounce Church Cenfures, ordain ruling Elders and Deacons, affift at the Imposition of Hands upon other Ministers, and moderate or preside in Ecclesiastical Judicatures. They are fettled in their Livings thus. Where a vacant Church has no Patton, a Probationer, that is, one licenc'd to preach, may be ordained and admitted Minister thereof by the Presbytery, upon a Call from the Heretors and Elders of the Kirk Seffion in a Country Parish, or from the Magistrates, Heretors and Elders within a Burgh. Whereupon he extracts an Act of Ordination

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⁽a) Act 3. Seff. 1. Par. W. & M. (b) Act 5. Seff. 2. Par. W. & M. (c) Act 23. ibid. (d) 10. A. C. 12.

and Admission, and has thereby a legal Title to the Benefice. If a vacant Church has a Patron, a Pastor is ordained and admitted therein, upon a Presentation from the Patron. But if those in a Country Parish, who have Power to call, or the Patron, who has Right to present. do it not within fix Months after the Vacancy. the Presbytery may plant the Church Jure

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5. A Minister has Right to the whole Year's Rent or Stipend, if he enter before Whitfunday, and to the Half, if his Entry be after Whitfunday, and before Michaelmass. But if he enter after Michaelmass, he gets no part of that Year's Stipend. When a Minister's Stipend is only modified, it affects the whole Tithes out of which it is modified, and may be exacted from any Intrometter, whose Tithes will go fo far; or fo much on't, according to their Extent, even from Tenants paying a joint Duty for Stock and Tithe. But then an Heretor distress'd gets a proportionable Relief off the rest in the Parish. When the Tithes of certain Lands are allocated for Payment of the Minister's Stipend, he has no Title to any Tithes without the Bounds of his Locality. General Letters of Horning are allowed for Implement of Decreets of Locality (b). Minister's poinding for their Stipends may comprize the Goods on the Ground (c). No special

⁽a) Act 23. Seff. 2. Par. W. & M. 10. A. Ch. 12. (b) Act 13. Seff. 2. Par. W. & M. (c) Act 21. Par. 1. Seff. 3, Ch. 11.

cial Decreets for Minister's Stipends can be sufpended, except upon Production of Discharges, or upon Consignation (a). Actions for Ministers Stipends commenc'd in inferior Courts, cannot be advocated; Suspensions of, and Actions for them, before the Session, are discuss'd summarly; and Suspenders, against whom Letters are found orderly proceeded, should be decern'd in a fifth Part more at least, than the Sums charg'd for Expences and Damage (b).

6. A Minister's Relation to his Church, and Interest in the Stipend thereof, is dissolv'd by his being transported to another Church, or deposed, or by his Resignation of his Charge in the Hands of the Presbytery, and their accep-

ting of it; or by his Death.

If his Title was so extinguished before Whitfunday, no Part of that Year's Stipend belongs to him; if after that Term, and before Michaelmass, he gets the Half; and if after Michaelmass, the whole Year's Stipend. In Case of a Minister's Death, his Widow, Children, or nearest of Kin, get Half a Year's Stipend, over and above what was due to the Deceas'd, called the Ann (c): Which is equally divided betwixt the Relict and the Children; and failing Children, betwixt her and the other nearest of Kin. If there be neither a Widow nor Children, it belongs to the nearest of Kin. This Ann needs no Confirmation: Nor can the Minister Ch.

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⁽a) A& 6. Par. 2. Seff. 1. Ch. II. (b) A& 27. Seff. 5. Par. & M. (c) A& 13. Par. 2. Seff. 3. Ch II.

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nister dispose of it to Strangers, or his Creditors affect it.

7. Elders and Deacons are Men of good Character, chosen by the Kirk Session, approv'd by the Congregation, and ordained by the Minister for Life. Both attend the Minister in visiting and catechising, and serve at the Communion Table; and are Members of the Kirk Session. But their Offices are thus distinguish'd. Ruling Elders have an equal Vote with the Minister, in all Business in the Kirk Seffion, and may be chosen to affift and vote in any other Church Judicatory. But the proper Bufinels of Deacons, is, to collect the Offerings for the Poor, to inquire into, and acquaint the Session with their Case; and to distribute to them as the Session appoints. They may give their Advice in the Kirk Seffion, if asked, but have no Vote, except in Matters relating to the Poor.

TIT. II.

Of the Laity.

THE Laity (from the Greek Acog) are the People, distinct from the Clergy. These are either the Nobility, or Commons.

Dukes, Marquesles, Earls, Viscounts, and Lords. Since the Union of the two Kingdoms, all, who were Peers of Scotland at that Time, and the Successors to their Honours and Dignities, take Place immediately after the

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then Peers of the like Orders and Degrees in England, and before all Peers of Great Britain of the same Rank, created after the Union. The Nobility of England, before the Union, and Peers of Great Britain, fince, have many considerable Privileges, which all Peers of Scotland before the Union, and the Successors to their Honours and Dignities enjoy, except the Right of fitting in the House of Lords, and the Privileges depending thereon, particularly, the Right of trying Peers in criminal Causes, which are appropriated to sixteen only of the Scottish Peers, elected, from Time to Time, by their own Body of Nobility, upon a Proclamation issued out under the great Seal of Great Britain. These Elect Members have all the Privileges of any English or British (a) Peer, and are elected in Manner prescrib'd by Statute (b).

2. The Commons are distinguished into Barones Minores, the lower Nobility, and Bur-

gesles.

Gentlemen. Knights, are those of the Thistle,

Baronets, and Batchelors.

Knights of the Thistle are the most Honourable Order of Knights in Scotland, first erected by King Achains, in Honour of St. Andrew, the Tutelary Saint of Scotland.

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⁽⁴⁾ Art. of Union 22, & 23- (b) Act 8. Seff. 4. Q. A. and 6. A. Ch. 23.

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Baronet, is a Degree of hereditary Honour, founded by King Charles I. in the Year 1625, for advancing the Plantation of Nova Scotia in America, and fettling a Colony there.

Knight Batchelor, is a Degree of Honour

for Life.

Gentleman, is one, whom his Blood and Race doth, without any other Title, distinguish from the Multitude, as being descended from a Family that hath born a Coat of Arms.

Gentry and Arms descend to all Sons alike, only the Eidest beareth the Arms without, and

the younger with Difference

[2.] Burgesses, are those who have the Privilege of Trade and Merchandizing within their respective Burghs, exclusive of all others. Those who exercise this Privilege, are called trafficking Burgesses; and such as do not use it, are stilled honorary Burgesses. Burgesses are divided into those who have Right to themselves only for Life, called simple Burgesses; and such as have it to themselves and their Children, called Burgesses and Gild-Brethren.

CHAP. II.

Of Persons in particular relative or civil Capacities.

Persons in particular relative Capacities, are, 1. Man and Wife. 2. Parents and Children. 3. Masters and Servants.

TIT.

TIT. I.

Of Husband and Wife.

M AN and Wife are made such by Marriage, the first Society of Divine Institution: Which Espousals do often precede.

Espousals are, a Contract, or mutual Promise to marry each other hereafter: From which either Party may resile, while Matters are intire; that is, till carnal Copulation follow.

I shall set forth, 1. What is Marriage, and the several Kinds of it. 2. What Persons may not contract Marriage. 3. The Essects and Consequences of Marriage, while it stands. 4. How Marriage may be dissolved, and the Essects of the Dissolution.

SECT. I.

What is Marriage, and the Several Kinds of it.

1. MARRIAGE is a Conjunction of Man and Woman, by mutual Confent, in a constant Society of living together till Death part them. For mutual Consent makes the Marriage, and sounds the conjugal Rights before Consummation: So be the Parties are capable to consummate it; but Affinity doth not arise from Marriage before Consummation.

press Consent; or presum'd, by tacit Consent, imply'd

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Chap. 2. Law of Scotland, Tit. 1. 9. 1. 59

imply'd from the Parties cohabiting as Man and Wife, or owning themselves to be married, or from Copulation subsequent to Espousals, or a Promise of Marriage. For Law doth not require the Hierologia, the Sacerdotal Benediction, as essential to Marriage; but considers the Ceremony of the Church, as a Piece of good Order to ascertain so important a Matter.

3. Marriage is either regular and solemn, or

clandestine and irregular.

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[1.] Regular Marriage in Time of Prelacy, was either after proclaiming the Names and Delignations, or Additions of the Parties, three feveral Times in their Parish Churches, called Proclamation or Publication of Bans, or by a Dispensation from the Bishop. But now Marriage is regular, if celebrated by a Minister of the Gospel authoriz'd by the established Church, after Proclamation of Bans. Which Proclamation hath this legal Effect, that Persons are thereby put in Mala Fide, to contract or deal with the Bride, to the Bridegroom's Prejudice, even after the first Diet.

[2.] Clandestine and irregular Marriage is that, which is not gone about in the orderly Way aforesaid. For which the Celebrator, Witnesses and Parties are liable to severe Penalties (a), and may be prosecuted at the Instance of those concerned, or of the Procurator Fiscal, where they happen to be questioned (b).

The

⁽a) Act 34. Par. r. Sef. r. ch. II. Junct. Act 6. Sef. 7. Par. K. W. (b) Act 12. Sef. 5. Par. K. W.

The inflicting of which Penalties, doth not exempt from Church Censure. Nor can the Parish Minister discharge them, upon the Offenders satisfying the Church. But clandestine Marriage subsists, as to all other Essects.

SECT. II.

Who may not contract Marriage.

PERSONS cannot marry, 1. Who cannot confent, as those within the Years of Pupillarity, that is Males under 14, and Females under 12 Years of Age. Error in a substantial Point, hinders Consent to Marriage: As, when a Man marries one Woman in Stead of another. But Marriage will subfift, notwithstanding of a circumstantial Mistake: As, when one marries a Strumpet, thinking her a Virgin; or a poor Woman, from an Opinion that the was rich. The Consent of Parents is not necessary to make the Marriage effectual, tho' Decency require it. Nor is the Consent of Curators required to a Minor's Marriage. 2. Marriage is forbidden betwixt those who are too near allied, or related to one another. Alliance or Relation, is either Kindred or Affinity. Kindred or Confanguinity is the Tie of Persons by Blood or Birth, deriving their Original from the same common Parent, called Kinsfolk. Kinsfolk by the Father's Side, are termed Agnats; those by the Mother's Side Cognats. nity is a Relation betwixt one of two married But Little of B Persons,

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Persons, and the Kindred of the other, dred and Affinity are distinguished by Degrees and Lines. A Degree is nothing but the Diftance betwixt Relations. A Line is a Series of Persons descending from one common Stock. 'Tis Twofold, the Right, and the Collateral Line. The right Line confifts of Parents, or other Ascendants; and Children, or other Descendants. The Collateral Line confifts of Brothers and Sifters, and other remote Kindred that are on the Side one of another, every one in his own Line, under the Ascendants common to them. Marriage betwixt Kinsfolk in the right Line of Ascendants or Descendants is altogether unlawful, and is prohibited in the Collateral Line between those, who are in the Place of Parents and Children, as Uncle and Niece, Aunt and Nephew. In short, we sustain no Marriage that is contracted within the Levitical Degrees (a); and all Persons may lawfully marry, who are not there prohibited, confequently Coufin-Germans, but no nearer Relations are allowed. The fame Degrees in Affinity, as in Confanguinity are forbidden (b).

SECT. III.

The Effects and Consequences of Marriage while it stands.

it stands, do concern both the Husband and Wife

(4) Levit. 18. (6) Ad 15. Par, 1. J. VI.

Wife equally; others do primarily concern the Husband; and a third Sort do more immediately

respect the Wife.

2. Those concerning the Husband and Wife alike, are, r. A Kind of Communion of Movables, or common Interest in one another's moveable Goods. But fome Things moveable, as to other legal Effects, fall not under this Communion, as moveable Bonds bearing Annualrent (c), Heirship Moveables. 2. All Donatives betwixt Man and Wife are revocable by the Granter, at any Time during his Life; even tho' it bear a Renunciation of the Privilege to revoke. This Revocation is either express, or tacit, inferr'd from after inconsistent Deeds of the Granter: As by disponing to another, or by contracting Debt, whereupon the Creditor affects the Subject of the Gift. And tho' the Granter should swear judicially never to revoke it, a promissory Oath of that Kind could not hinder the Effect of fuch a tacit indirect Revocation by Diligence, at the Instance of the Donor's Creditor, or by a posterior Grant to another for an onerous Caufe. There is this Difference betwixt a Man's Gift to his Wife, and her's to him: That the former will be fustained as a remuneratory Gift propter Nuptias simply, if there was no Contract of Marriage, and it be moderate, and may be revoked, in fo far, as it is exorbitant, or unfuitable to the Quality and Condition of

(c) Act 32. Par. 1. Sef. 1. Ch. II.

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the married Persons; whereas, a Gift by a Wife to her Husband is revocable, except it bear either in Implement of her Contract of Marriage, or be expressly given in Place of a Tocher, where there was no anterior Contract; or, unless the Husband hath given her the Equivalent. But, if a Man or Wife dispone in free Gift principally to a Third Party, a judicial Ratification will render the Deed effectual, tho' the Husband or Wife hath some consequential Advantage thereby. Nor is a Gift betwixt Man and Wife null; for it is consirmed by the Granter's Death, and cannot be revoked by his Heir.

3. The Effects of the conjugal Society, with Relation to the Husband, are either active or

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[1.] The active Effect of it is his Jus Mariti, which includes, 1. A Power over the Wife's Person. 2. An Interest in her Goods. 1. He may recover his Wife's Person from any that would with-hold her from him. She must follow and live with him, ferve and obey him in Cases within the Limits of reverential Love and Duty. He is a Tutor to her. 2. A Hufband's Interest in the Wife's Goods, carries, 1. A Right to manage her whole Fortune heretable and moveable, which is a Faculty fo inseparable from his Character, that any Refervation thereof by the Wife, or Renunciation by him before the Marriage, is ineffectual, and accrues and falls back to himself. 2. The Hufband

band hath Right to the Property of all his Wife's Moveables falling under the Communion, that is Species of Goods, Sums of Money, moveable Bonds not bearing Annualrent, Rents of Lands, and Annualrents of heretable Bonds, which Marriage is a legal Affignation to. This Right of Property, or some Part thereof, he may, before the Marriage, effectually renounce by Contract, in Favour of his Wife. And alimentary Provisions to a Wife, in case the Husband cannot, or will not entertain her, are so personal to her, that they don't return to the Husband or his Creditors, whether made by the Husband, if not in Fraudem Creditorum, or by a Third Party: But the Husband may only partake with her in the Benefit thereof, for their joint Sustenance.

[2.] The paffive Effects of Marriage, with Respect to the Husband, are, 1. He is obliged to aliment his Wife, and furnish her with all Things necessary for her Life, Health and Ornament, according to his Means and Quality; but not to give her these to live out of his own House. A Husband, after Inhibition used by him against his Wife, is not liable for any Thing furnished to her, unless it is fuitable to her Quality, and he cannot instruct, that he sufficiently provided her other Ways. 2. A Husband, during the Marriage, is liable to moveable Debts contracted by his Wife before the Marriage: That is, Debts of the Nature of those, which, if owing to the Wife, he hath

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Right to Jure Mariti. So that he is not liable for the principal Sum in his Wife's moveable Bond bearing Annualrent, but only for the Annualrents thereof, during the Marriage. A Husband is not liable for his Wife's Trespasses.

4. Effects of Marriage, with Relation to the Wife, are, 1. Her Interest in the Paraphernalia; which belong to her as absolute Proprietary, exempted from the Communion of Moveables, and from the Husband's Administration, or the Diligence of his Creditors, and may be impignorated by the Wife. Some Things are of their own Nature Paraphernalia, as those peculiar to the Wife's Person, and no ways proper to the Hufband's Use, unless of greater Value than suits with her Quality. Other Things, which are of common and promiscuous Use to Man and Woman, and so not of their own Nature Paraphernalia, may become fuch, by the Husband's giving and appropriating them to his Wife, before, or on the Marriage Day, or by giving them to her afterwards, and not taking them back from her in her Lifetime. But Things of common Use, so appropriated to a Wife by her Husband, are reckoned Paraphernalia, only with Respect to him, who did so appropriate them, and esteem'd common Moveables, as to a lecond Husband, unless, also appropriated by him to the Wife. 2. A Wife cannot be purfued or cited, without calling her Husband for his Interest; and if she marry, during the Dependance of a Suit against her, it must stop till

till the Husband be cited. 3. She cannot purfue her Husband, except upon very special and urgent Confiderations: As, when wergit ad Inopiam, or when the purfues an Aliment against him, who hath diverted from her, &c. Nor can a Wife charge or pursue any other Person, without the Concurrence of her Husband; unless he be forfeited, or unreasonably refuse to 4. A Wife's Bond, or personal Obligation for Debt, even with the Husband's Consent, is null, and cannot be made good by her judicially ratifying the same, and swearing not to controvert it. She is free from personal Execution for civil Debt. But in some Cases, a Wife may grant effectual Obligations and Rights, with Confent of her Husband. As, 1. A Wife having an Aliment fettled upon her, and exempted from her Husband's Jus Mariti, may, with his Consent, grant personal Obligements to affect her, or that Aliment. 2. She may, with his Confent, dispone or wadset her Heritage, or oblige herself, ad Factum prastandum: But, in Regard, such Rights may be quarrelled Super Vi & Metu, Wives granting heretable Rights, or renouncing their Jointures, are usually required to ratify such Deeds judicially upon Oath. 3. A Wife's Bond, or perfonal Obligement, will, in some Cases, bind her Husband: As her Bond for Money furnished towards her necessary Aliment; or the Bond or Bill of a Wife Praposita Negotiis, for Goods the buys.

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SECT. IV.

How Marriage is dissolved; and the Effects of the Dissolution.

MARRIAGE is dissolved by Death of

either Party, or by Divorce.

Day of the Marriage, all Things done in Contemplation thereof on either Side blow up, become void, and return to the same Condition they were in before the Marriage, unless there was a living Child of the Marriage heard cry; or that it was otherwise pactioned. But Marriage is effectual by the Birth of a living Child, tho' both it and the Parents die within the Year. If Marriage, after expiring of the Year, dissolve by Death of either Party, the Survivor hath Right to the contracted and legal Provisions, unless the latter be discharged, or inconsistent with the former.

Right to by her Husband's Death are, Jus Reliefa in the Moveables, and a Terce of his Lands, an Aliment to the next Term after his Death, and the Expence of her Mournings, if it become her to have Mournings. And albeit she hath absolute Right to her own Paraphernalia, whereof no Part falls under her Husband's Executry, she hath a Share of the Habilements of his Body falling under Executry.

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[2.] By Diffolution of the Marriage thro' the Wite's Death, the Husband surviving hath Right; 1. To the Tocher, unless it was by Agreement, to return to the Wife's Representatives; and also, to the Moveables that were Communion, deducing the Wife's legal Share, which goes to her Executor, and the Childrens Legitime, if there be Children of the Marriage. 2. If the Wife was an Heires, and there was a Child of the Marriage heard ery, her Husband hath Right to the Courtely of Scotland. 3. A Husband is no further liable to pay the Debts of his deceased Wife, than in so far, as he was a Gainer by her Estate, beyond the Onera Matrimonii, or a fuitable Tocher, which he might have got with another Wife, or in fo far, as his Estate was affected by complete Diligence against him, during the Marriage, unless he then gave a Bond of borrowed Money for the Debt. Nor is the Husband accountable for his Wife's Debt as Lucratus, if she have left any visible Estate to her Representatives, till these be first discussed.

2. Divorce is the Separation of married Perfons in their Lifetime, by the Sentence of the proper Judge; that is, the Commissaries of Edinburgh, who have the fole Power to decide in all Causes of Divorce (a). This Sentence is either declaratory, or pronounced for some Cause emergent during the Marriage. A declaratory Sentence is that, which declares the

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Marriage void from the Beginning: Because, either Party stood married before to another yet living; or, for that the Parties are within the forbidden Degrees of Confanguinity or Affinity; or, because of the natural Unfitness of either Party, to concur in the Work of Generation, which is called Frigidity in the Man, or Impotency in the Woman. Causes emergent during the Marriage, for which Parties may be divorc'd, are Adultery, and wilful Defertion. The Law seems to require four Years wilful Defertion, before the Deferter may be cited, and sentenc'd to adhere (b): But the Commissaries decern to adhere upon a Year's Defertion, or less Time, thinking it sufficient, that four Years precede the Decreet of Divorce. If the Deferter, after being charg'd and denounc'd upon the Decreet of Adherence, continue obstinate, the Church excommunicates him; and then the Commissaries proceed to Divorce; the Pursuer whereof is bound to Iwear, that the Process is not carried on by Collusion. After Decreet of Divorce is obtained, the Person guilty, forfeits all Benefit by the Marriage (c): But the innocent or injured Party hath the same Benefit, as if the other were naturally dead. Marriage betwixt one divorc'd for his own Adultery, and the Person with whom it was committed, is unlawful and null, and their Issue incapable to succeed to them (d). Nor can the Woman divorc'd E 3

(b) Act 55. Par.4. J. VI. (c) d. Act 55. (d) Act 20. Par. 16. J. VI.

for Adultery, marrying the Man with whom she offended, or haunting his Company at Bed and Board, dispone her Lands, or set Tacks thereof to him, or the spurious Issue betwixt them, or to any other Person in Prejudice of those, who otherwise would have succeeded as Heirs to her (a).

TIT. H.

Of Parents and Children.

Parents and Children according to the Nature of Relatives, may be divided the same

Way, viz. into lawful and unlawful.

1. Unlawful Children are those begotten by a Man, to whom the Mother is not married at all, or unlawfully married, by their being within the forbidden Degrees, or by either Parties having a lawful Spouse living. These are term'd Bastards, and their State and Condition Bastardy, which can be only tried before the Commissaries of Edinburgh. The Effect of Bastardy is, that it disables the Bastard to succeed to his natural Father, or to any Kinsman on the Father's Side, nor can they succeed to him (b).

2. Lawful Children are either born in Wedlock, or legitimated: For the Law of Adop-

tion is not received here.

(a) Act 117. Par. 12. 3. VI. (b) Vid. Part III. B. L. Ch. 3. § 3.

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[1.] Children born in Wedlock, are confidered by the Law while they are in the Mother's Belly, and after they are born. Law takes notice of Children in the Belly, in fo far as they are supposed to be born, if that Allowance will be to their Advantage after they are born. Children, after they are born, are diftinguished. 1. By the Time of their Birth. The eldeft Son in Right of his Birth, hath the Privilege of Primogeniture, which entitles the eldest Son to the fole Succession in his Parents Heritage, Oc. And albeit Daughters, failing Sons, succeed equally, the eldest only gets all indivisible Rights. 2. Children are either of the whole Blood, who have one common Father and Mother, called German Brothers and Sifters; or of the half Blood, who have either the same Father, and not the fame Mother, called Confanguinean, or have one Mother, but different Fathers, called Uterin Brothers and Sisters. Children born in Wedlock, are held to be lawful, tho' brought forth immediately after the Marriage, unless the Husband disown upon Oath any antenuptial Copulation with his Wife. In dubio, he is prefumed to be Father of a Child, who, the Time of Conception, was married to the Mo-But this Presumption of Law may be taken off by contrary Proof, as that the Hufband was absent, when the Child behoved to have been gotten.

[2.] Legitimated Children are natural Children made lawful, either by subsequent

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Marriage

Marriage of the natural Parents, or, by a Let-

ter of Legitimation from the King.

3. A Father has the Custody and Conduct of his Children, and Right to the Fruit of their Labours, till they be Forisfamiliate by Marriage, or by fetting up a separate Employment for their Livelyhood. He is lawful Administrator, both as Tutor and Curator ipso jure to them, without being liable for Omissions or misauthorising; and may, in Liege Poustie, name others to be Tutors or Curators to them after his Death, with this Quality, That they shall

not be liable for their Omissions (a).

4. Children are entitled to Entertainment and Education from their Parents, and Parents from their Children, where the one is in Case to do it, and the other wants it. Under which Denomination of Parents and Children, all Ascendants and Descendants are comprehended: But the first in Degree are to be preferred, and the paternal Line to the maternal. Children owe Reverence to their Pa-The beating or curfing Father or Mother is punishable with Death, if the Offender be above the Age of Sixteen, and arbitrarily if he be under that Age, and above Pupillarity (b).

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⁽⁴⁾ Act 8. Seff. 6, Par. K. W. (b) Act 20. Par. 1. Seff. 1. £4. 11.

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TIT. III.

Of Masters and Servants.

HUmane Necessity and Conveniency introduced the Distinction of Masters and Servants.

Servants are either Slaves, or Hirelings, or

Apprentices.

1. Slaves are thole, who are at the arbitrary Pleasure of their Masters, and may be fold by him as his Goods. We have no veftige of Slavery remaining in Scotland, except in Coalhewers and Salt-makers; who having once been employed to work in Coal-Pits or Salt-Houses by the Coal or Salt-Master, are, by Law, without any express Paction, inthrall'd or affricted, during their Life, to perform these Services to him; and may be recovered by him from any unlawful Possessor, to whom they unwarrantably revolt from their Master's Service. These, if challenged within a Year, the Possesfor mult deliver back to their Maiter within twenty four Hours, under the pain of 100 L. Scots to be paid to him (a). Coal and Salt-Masters are also impowered to apprehend and fet to Work Vagabonds and sturdy Beggars (b). But are not allowed to give to Coal-Hewers more than 20 Merks Money foresaid in Fee or Bounty; and these and other Work-men in Coal-

⁽a) Act 11. Par. 18. 94. VI. junct. Act 56. Par. 1. Self. 1. Ch. II. (b) Act 11. Par. 18. Ja. VI.

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Coal-Pits and Salt-Houses, must Labour all the six Days of the Week upon pain of 20 sh. per diem, to be paid to their Master, besides corporal Punishment, and making up his Pre-

judice (a).

2. Hirelings or hired Servants are free Perfons, who voluntarily undertake to serve their Masters for a Time, upon Condition of their getting Payment of the Fee or Wages agreed to betwixt them and their Masters. Justices of Peace, in their Quarter-Sessions, ought to determine the Quantity of Servants Fees, and may compel, by Imprisonment and other Punishment, to serve for these Fees; and oblige Masters to pay them (b). A Servant hired from Martinmas to Whitsunday may be detain'd by his Master, or compelled by a Justice of Peace to stay with him for the same Hire from Whitsunday to Martinmas, unless the Servant can verify that he is hired to another Master: And a Justice of Peace may compel a Servant running away, to return to Servants may be corrected his Master (c). with Moderation by their Masters. If a hired Servant die within the Term, the Hire is due to his Representative only, according to the Time he ferved. But if a Servant retained for a Year fail Sick, or be disabled to work for a Time, while there is hope of his Recovery, the Ma-

⁽a) Act 56. Par. 1. Seff. 1. Ch. II. (b) Act 8. Par. 22. Ja. VI. Act 38. Par. 1. Seff. 1. Ch. II. (c) Act 21. Par. 23. Ja. VI.

fler cannot put him away, or abate his Wages upon that Score.

3. Apprentices are a Kind of Servants, who are bound by Indentures (with their own Confent, or by the Agreement of Friends) to ferve Men of Trade for certain Years, upon Condition, that the Master shall, in the mean Time. Instruct them in their Art or Mystery. The general Duties of Master and Apprentice towards one another may be collected from the Style of Indentures enter'd into betwixt them; which varies according to the Nature of the Employment, the Apprentice is to learn, and the Articles stipulated betwixt the Parties. Apprentices, during the Time of their Apprenticeship, are under the Power of their Masters, to whom any Gain they make doth accrue, unless it be otherwise pactioned, and may be corrected moderately by them for Faults and Misdemeanours.

Having thus far spoke of Persons in their natural and civil Capacities; I proceed to treat of their Estates.



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PART II.

Of Estates, and how acquired, extinguished, and affected with Burdens.

An Estate is a Right to Things confifting of Possession or Property.

BOOK I.

Of Possession and Property; The natural and feveral Kinds of them; and the general Ways of acquiring Right to Things confisting of Property and Possession.

CHAP. I. Of Possession.

OSSESSION is sometimes used to fignify Property, as when a Man is faid to have great Possessions. Sometimes, it signifies the holding or detaining of a Thing. In which last Sense the Word is here taken, either for simple Holding Ch. I

or Deta fion on for one by fom fion.

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or Detaining, which is the being in Possession only without a Right; or for detaining for one's proper Use, and debarring others by some Title, which is properly term'd Possession.

TIT. T. T.

Of the Several Kinds of Possession.

1. Possession is commonly distinguished in-

[1.] Natural Possession is, the having or using a Thing naturally and corporally by our selves: As when we possess Ground by labouring it, and reaping the Fruits, or any moveable Thing, by having it in our Hands or Custody, and

doing with it as there is Occasion.

[2.] Civil Possession is one's having or using a Thing by his Mind, and the Hands of another, who holds it in his Name, as a Depositary, Servant or Factor; which is held and reputed Possession in Law. Of this there are several Sorts and Degrees. As, 1. The obtaining a Decreet of Mails and Duties, or even using Citation upon an heretable Bond. 2. Receiving Payment of an Annualrent from the Debtor, in an Infeftment of Annualrent. And where such an Infestment affects Lands, even in different Shires, Payment of the Annualrent from the Tenants of either of these Lands is understood Possession thereof out of both. 2. Where a Man is seised in Lands, and

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and, for Warrandice of these, insett in other Lands, at one and the same Time; Possession of the principal Lands, is reputed Possession of the Warrandice Lands. but inseitment of Relief, is not fufficiently clothed with Possession, by Payment of Annualrent to the Creditor of the Debt, for which the Relief was granted. 4. If a Womanbe infeft by her Husband in a Liferent, the Husband's Possession is accounted her Possession. 5. Possession of a Liferenter by Reservation, is reckoned the Fiar's Possession. 6. When a Wadsetter sets to the Granter of the Wadset a back Tack of the Lands disponed, for a Tack duty equivalent to the Annualrent of the Money, for which the Wadset is granted; he the Wadsetter, by receiving Payment of the back Tack-duty, is faid to possess the Wadset Lands per constitutum, and the true Owner of the Land becomes a Tenant, possessing in the Name of another.

2. Possession is either lawful, that is, fair and

honest, or unlawful.

[1.] A lawful Possessor, is he who is truly Master of the Thing, which he possesses, or Possessor bona Fide, with a good Conscience, who has just Cause to believe that he is so, althoin Essect he is not: As the Buyer of another's Thing from a Person he thinks it belongs to.

[2.] An unlawful Possessor, is he who possesses mala Fide; that is, possesses a Thing as his own, when he knows very well, either that

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he has no Title at all to it, or that his Title thereto is vitious and defective.

TIT. II.

How Possession is attained and loft.

Possession is attained, both by, and without Delivery. Delivery is that, which makes a Thing pass out of the Power of one, into that of another.

Delivery is either real, or symbolical, or seign'd. Real or true Delivery is, when a moveable Thing is given by the Hand to another; or, when one is brought into Possession of what is immoveable, by the Owner or his Proxy.

Symbolical Delivery is, either when Poffession of a Thing present is given by the Delivery of some Symbol or Token, which is a Part of it, as Land, by Earth and Stone; a Mill, by the Clap thereof; an Annualrent, by a Penny, &c. Or, when Possession is given by some Symbol, which is no Part of the Thing to be possessed, but only represents it, as a Fishing, by a Net; an Office, by a Copy or Scroll; and Resignation, by a Pen.

Feigned or imaginary Delivery is, when, without any corporeal Act, Delivery is supposed from the Intention and Sufferance of the Owner: As, when Goods in one's Possession, as a Pledge or Loan, are given or sold to him, Fistione brevis Manus, the Pledge or Loan is supposed to

have

pofg as that he have been returned to the Owner, and by him

redelivered by Gift or Sale

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Possession is acquired to one, without any Shadow of Delivery, and inferr'd merely from a joint or relative Interest betwixt him and another Possessor: As, when a Liferenter's Possession is accounted the Fiars Possession; or, a Husband's Possession is reckoned the Wife's Possession.

Possession is lost to one, when another comes to possess. For there can be only one true Posfessor of the same Thing.

TIT. III. The Effects of Possession.

Ossession hath many Advantagious Effects. 1. Possession gives often the Property. It hath in some Cases this Effect, at the same Time that one enters upon Possession. Thus Things belonging to no Body, are acquired by one's laying Hands upon them, and getting them in his Power, as by Occupancy, or fin-Again, current Money doth fo far become the Property of the Possessor, that it pasfeth from Hand to Hand, without any Question about the Haver's Title to it. In other Cases, Property is acquired by Possession, not in Instanti, but by such as is continued during the Time regulated for prescribing. z. In many Cases Possession is a presumed Title of Property. Property is sometimes presumed from present

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present Possession. Thus Property in Moveables is prefumed from Possession, till the Contrary appear by another's instructing a positive Title to them, and that they pass'd from him otherwise than by Alienation. Property is also often presumed from Possession continued for some Years. V. G. Triennalis Possessor Beneficis Ecclesiastici, est inde securns. An Incumbent's Right to a Benefice, after three Years peaceable and uninterrupted Possession, cannot be quarrelled, during his Lifetime, by any other Candidate or competing Church-Man. tron, who had been in the uninterrupted Posseffion of presenting Ministers trind Vice, or, the three last Vacancies of the Church, hath the only Right of Presentation in possessorio. ven Years Possession of a Benefice, without a Title, gives a possessory Judgment. Decennalis et triennalis Possessor Beneficii, non tenetur docere de Titulo. Which 13 Years Possession is a prefumed Right, till the Possessor's true Title be produced. 3. Possession may be defended 22 gainst those from whom it flowed not, upon any Right in the Possessor, or his Author; but can be ascribed only to that Title by which it did begin, in Prejudice of him it was acquired from, and to whom it must be restored. In which Case the Possessor cannot change the Cause of his Possession. 4. A Possessor with a good Conscience, while he is ignorant of any better Right to the Thing than his own, enjoys and makes his own the Fruits gathered, and spent

by him. A knavish Possessor, who knows that he has no colourable Title to what he Possessor, is obliged to restore, not only the Fruits which he has enjoyed and spent, but also those which a careful Man might have reaped from the Subject possessor. In a Competition concerning Possessor and Property, the Question about Possessor is judg'd, before Inquiry is made into the Right of Property.

CHAP. II.

Of Property.

Paction doth hinder. When this Right of disposing of, or claiming any Thing any Thing is appropriated to single Persons, or to Societies or Corporations (who are considered as one Body politick) it bears the special Name of Property. When it belongs equally to several Persons, its term'd a Common, or Commonty. Two Persons cannot have the whole Property of the same Thing; but there is only one who is the true Owner.

Property is divided, 1. Into Civil and Ecclesiastical. 2. Into Moveable or Personal, and Immoveable or Heritable. 3. Into absolute and limited Property.

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of Civil and Ecclefiafticcal Property.

CIVIL Property is that, which belongs to Lay-men, or Lay Corporations.

2. Ecclesiastical Property is the Patrimony of the Church, or the Livings of the Clergy, which is called a Benefice: Because it was the Effect of the Bounty and Liberality of such as mortified Rents and Possessions to pious Uses.

Annats, anciently applied to pious and publick Uses, were claim'd by the Pope, as his Property; but could never be exacted in Scotland; without the King's Consent, who got the first Peny; and were sometimes disposed of by the

Parliament (a)

4. Benefices were, 1. Either Regular, or Secular. Whereof the former belonged to Monks and Regulars; and the latter were the proper Livings of Church-Men. 2. Benefices were either given in Title, or Commendam. He who had a Benefice in Title, called Titular, had Right thereto as his own, during his Life, with Power to grant Rights of it, and dispose of the Rents. Such as had Benefices in Commendam only, were called Commendators. Commendam only, were called Commendators. Commendam was a void Benefice, commended to the Care of one, till it was F 2

(a) Act 4. Par. 3. Q. M.

conveniently supply'd of a Titular: For the Rents whereof, the Commendator was liable to hold Compt. A perpetual Commendam was, where the Commendator had Power to dispose of the Benefice in the same Manner as a Titular, and to apply the Profits to his own Use, during his Lifetime. These perpetual Commendams were discharged in the Year 1466 (a). But after the Reformation, many Popish Benefices were conferr'd by the King upon Laicks, who had been most active in the Reformation. These were called Commendators.

5. Benefices consisted of a Temporality and Spirituality. The Temporality was in Lands, with other civil Rights and Possessions: The Spirituality comprehended Churches, Church-Yards, Manses and Glebes of Church-Men, and Tithes. In the Year 1587, the Temporality of Benefices, with many Exceptions, was annexed to the Crown (b). But much of it, and also of the Spirituality, was before, and after, erected into Lordships and Baronies. Some Benefices were conferred for pious Uses on Burghs Royal, and some upon Colleges.

6. Churches are publick Houses, erected for Divine Worship and Service, and for preaching the Word of God. All Churches, except where the King is Patron, and the mensal Churches of Bishops, are to be repair'd by the Patron, out of the vacant Stipends (c). Where these

(a) AA 3. Par 1. Ja. III. (b) AA 29. Par. 11. Ja. VI.

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these fail, the Burden of building and repairing the Church, doth ly upon the Heretors, whether they relide in the Parish, or not; who must ftent themselves for that Effect. But the Patron, or intrometter with the Parsonage Tithes, is bound to uphold the Quire; and to pay a Third of the Stent imposed, where the Quire is not distinctly known from the rest of the Body of the Church. If the Heretors refuse, being requir'd by the Minister and Kirk-Session, to meet and stent themselves, for repairing the Church, the Lords of Session will, upon a Bill, grant Warrant to the Minister and Kirk-Seffion, to stent them proportionably; according to the Valuation of their Lands in that Parish: To the making of which Stent Roll the Heretors must be warn'd.

Seats in the Church, built and repaired upon the common Expence of the Parish, may be disposed of by the Kirk-Session, in Favour of Parishoners, according to their Ranks and Qualities. Seats which particular Heretors have built for their own Use, with Consent of the Kirk Session, or which they have prescribed a Right to by 40 Years Possession, as Part and Pertinent of their Lands, are at the Heretor's own disposal. Where a Seat is possessed as Part and Pertinent of Lands, it goes to a Purchaser, by a Disposition of the Lands. But where the Lands and Seat are possessed by distinct Rights, the Seat requires to be specially disponed. The Patron is privileged to have

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his Seat in the Quire. In Burghs Royal, the Town Council have the Disposal of Seats in the Church.

The Heretors are bound to pay for, and are stated in the Property of the Bells and Utenfils of the Church: But the Minister and Kink-Session may pursue for any of these that are abstracted, or taken away.

Every one must have some Way to the Church; but cannot pretend to any special Way as the nearest, without proving immemorial Possession

of such a Gate or Passage.

7. The Minister has Right, during his Incumbency, to the Church-Yard, and may shear the Grass on't, for the Use of his Horse, or Cows, and may hinder others: But cannot cut the Trees growing there. Heretors of the Parish must build and repair the Church Yard-Dykes, with Stone and Mortar, two Elns high, having sufficient Stiles, or Entries: And the Lords of Session may issue out Letters of Horning against them for that End (a). Church Yards can neither be Feu'd, nor set in Tack.

8. A Manse is a Dwelling-house appointed for the Minister of the Parish. The Parson of Vicar's Manse nearest to the Church, was appropriated to the Minister serving the Cure (b). Where there was no such Manse formerly, Ministers provided to Cathedral or Abbay Churches were to have one within the Precinct of the Cathedral or Abbay, unless the Prelate

(a) Act 232, Par 15. J. VI. (b) Act 48. Par. 3. J. VI.

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or Feuar appoint them with another as good and commodious (a). But if there is no Manfe for a Minister settled elsewhere, the Heretors must build him a sufficient Manse, not exceeding 1000 lib. Scots, or 500 Merks of Value (b). It is usual to allow half an Acre of Ground for the Manse and Yard. Where there is a competent Manse already built, the Heretors must repair it once sufficiently at the Minister's Entry, who is to uphold the fame, during his Incumbency, and they out of the vacant Stipends, while the Church is vacant (c). Liferenters are not liable to contribute for the building of a Manse, tho' they are bound to pay for repairing it. But neither Building nor Reparation affects fingular Successors.

9. A Minister's Glebe should consist of sour Acres of arable Land, or 16 Soums Grass, where there is no arable, but Pasture Ground; to be designed, in the first Place, out of the nearest Lands belonging to Parsons, Vicars, Abbots, or Priors; and if there be none such, out of any other Church Lands within the Parish (d). Besides which Glebe, the Minister should have a Horse, and two Cows Grass, design'd as the Glebe, out of Church Lands. And if there be no Church Land, or only arable Land near the Manse, the Heretors of adjacent Land are to pay the Minister 20 lib. Scots yearly for his

F 4 Grafs

⁽a) Act 116. Par. 12. J. VI. (b) Act 21. Par. 1. Seff. 31 (b) II. (c) Ibid. (d) Act 161. Par. 13. J. VI. junct. Act. 7. Par. 18. J. VI.

Grass (a). But no incorporate Acres, where the Heretor hath Houses and Gardens, are to be design'd for Glebe, if he give other Land nearest to the Church. Ministers in Royal Burghs have no Right to Glebes (b). Unless their Parishes be partly in the Country, Partly in Town.

10. In Time of Prelacy, Manses and Glebes, with Grass for Ministers, were designed by the Bishop, Or Ministers appointed by him, with two or three discreet Men of the Parish (c). But now, that is done by the Presbytery, the Moderator whereof gives the Minister, or a Procurator in his Name, Infefrment in the Subject designed. Upon which he or his Procurator takes Instruments in the Hands of a Notary, or of the Clerk of the Presbytery. And the Lords of Seffion, upon a Petition given in by the Minister, with the Act of Designation and Instrument, grant Warrant for Letters of Horning, to charge the Possessor of the Lands designed, to remove within ten Days. If the Defignation be of old Glebes or Manses of Parsons or Vicars, the Possessors of these get no Relief off the Heretors of other Church Lands within the Parish. But if other Church Lands be design'd for the Minister, Relief is competent to the Proprietors thereof pro rata, off the rest of the Heretors of such Lands. When the Designation is of temporal Lands, the rest of the

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⁽a) d. Act 21. Par. 1. Seff. 3. Ch. II. (b) Ibid. (c) Ibid.

the Heretors of temporal Lands must contribute proportionably, for Relief of those whose Lands are designed. This Relief is not debitum fundi, affecting singular Successors, but only the Heretors for the Time. Tho' Manses and Glebes of Ministers are more allodial than seudal, being given to them by Acts of Parliament, without any express Holding or Reddendo; they are considered as held of the King in Mortification.

Goods and Rents due for maintaining Divine Service, called the Patrimony of the Church (a). Which Quota hath varied in different Countries: But generally, tis considered, as the

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When the Pastoral Care was divided into Parishes, the Tithes of each Parish were set off for a Provision to the Parochus, their particular fix'd Minister. The Minister being either a Parson or Vicar: Hence arise a Division of Tithes, with Respect to the Persons payable to, into Parsonage and Vicarage Tithes. Parsonage Tithes are the Tithes of Corn, called Decima Garbales, or, Teind Sheaves, or, the great Teind. These belong to the Parson, and are the same in all Places, liable to no Alteration or Extinction by Prescription, or long Custom. Vicarage Tithes are the Tithes of inconsiderable Things, as Lambs, Wool, Cheese, Geese, Fruit, Lint, &c. called Decima Vicaria, or the small Tithes. Thefe

⁽⁴⁾ A& 10. Par. 1. 3. VL

These belong to the Vicar, and as they came in by no positive Law, but only by Custom, the Subject and Quantity thereof is purely local, differing in different Parishes, and sometimes in different Places of the same Parish. A Right thereto is acquired, modified, and lost by

Prescription of 40 Years.

The Pope, as universal Bishop, pretending a Sovereign Right to all the Revenues of the Church, took upon him to alienate Tithes at Random to Monasteries. He granted also Dispensations from Payment of them to some religious Orders, as the Ciftertians, Hospitalers, and Templars. And tho' our Law made it criminal to take a Right to Tithes from any fave the Parsons, or Vicars, or their Farmers (a), Tithes in this Country were frequently mortified to Cathedral and Collegiate Churches, Chappels, Monasteries, and Nuneries, by the Founders and Benefactors; and Parish Churches, with their Tithes, were often annexed to these by the Patrons. Many Rights of Tithes were also made in Favour of Laymen. For preventing whereof, a Canon was made (b) in the Council of Lateran, under Pope Alexander III. in the Year 1179, whereby the feuing of Tithes to Laymen was discharged. But Decima inclusa nunquam antea separata, which, for a long Time, beyond the Memory of Man, have always gone along consolidate with the Stock, were ever been sustained as an Exception, without the Verge of the

(a Act 7. Par. 2. J. IV. (b) c. 19, X. de decimis.

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the Canon's Prohibition. A Disposition of Lands from one having Right thereto cum decimis inclusis, carries Right to the Tithes, tho' not expresly mention'd: But this doth not hold, where Lands and Tithes are possess'd diverso If a Tacks-man of Tithes continue to possels after the Tack is out, he will have the Benefit of tacit Relocation, which is interrupted by Inhibition in Parsonage Tithes serv'd at the Church Door, upon a commissary Precept; and by either Inhibition, or Citation in Vicarage: After which the Intrometters are liable to a Spuilzie. Tithes are not debita fundi, but affect only Intrometters. Nor are Tenants. who pay a joint Duty to their Master for Stock and Tithe, liable to the Titular, in fo far as they have paid to their Master: But they are liable, as others, to the Minister for his Stipend, when payable out of the Tithes.

Tithes were not annex'd to the Crown, with the Temporality of Benefices in the Year 1587. But such as got Monasteries, &c. erected into Lordships and Baronies in their Favour, had thereby Right to Tithes belonging to

these Societies.

12. King Charles I. made a Revocation, and rais'd Reduction of all these Erections, as done in Prejudice of the Crown, and otherwise null. Which produc'd four Submissions to the King, by the Parties concern'd: One by the Lords of Erection, called the General Surrender, another by the Bishops, a third, by some particular Ti-

tulars of Tithes, and a fourth, by the Royal Burrows. Upon these the King pronounc'd so many Decreets arbitral, which were ratified in Parliament. 1. The Superiorities of Ecclefiastical Benefices, with the Casualities thereof, were declared to pertain to the King; referving to the Lords and Titulars of Erection, the Feu-Duties, till redeem'd by His Majesty at ten Years Purchase (a). But the Reversion of these Feu-duties, is now discharg'd in Favour of the Lords of Erection, and their Affigns (b). Superiorities belonging to Bishops, and their Chapters, or depending Offices (c), and also their Tithes; now, by the abolishing of Prelacy, belong to the King. Patrons have Right to Tithes not heretably disponed, with the natural Burdens affecting them (d). 2. The Tithe was determin'd to be a fifth Part of the constant Rent, where the same is valued jointly with the Stock: And that where these are set for diffinct Duties, the Heretor should get Deduction of a fifth Part of the true Rent of his Tithe, thence called the King's Eafe. heretable Right of Tithes, when valued, was allowed to be bought at nine Years Purchase, and temporary or inferior Rights to be proportionably cheaper, according to the Continuance, and Quality of them (e). Tithes not heretably disponed, given by Law to Patrons, are redeemCh. 2

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⁽a) Act 14. Par. 1. Ch I. (b) Act 11. Seff. 4. Par. Q. A. (c) Act 29. Seff. 2. Par. W. & M. (d) Act 32. Ibid. (e) Act 17. Par. 1. Ch. I.

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redeemable by the Heretors at fix Years Purchase (a). But no Tithes can be bought, that are either possess'd by Ministers for their Stipend (b); or belong to the King by the abolishing of Prelacy, so long as they remain undisponed; or that are appropriated to Colleges, Hospitals, or other pious Uses; or that once pertained to the Heretor, who disponed the Lands without, or reserving the Tithes (c).

3. The King got Right to an Annuity out of the Tithes (d), which since the Year 1674, hath not been inquired after.

TIT. II.

Of moveable, or personal, and immoveable or heretable Property.

Moveables, or moveable and perfonal Rights, are those that pass by Succession, to the Owner's Executors, if not disposed of by him in his Life, which are called personal, because immediate Action, or Diligence for recovering them, lies against one's Person.

2. Immoveable, or heretable Rights, of Things, are such as go to Heirs, whence they are term'd heretable. If these affect the Subjects thereof, so as to defend the Haver, against his Author's singular Successors, they are called real Rights. Real Rights are divided into

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(a) Act 23. Ses. 2. Par. W. & M. (b) Act 30; Ibid. (c) Act 23. Sess. 4. Ibid. (d) Act 15. Par. 1. Cb. I.

Heretage and Conquest. Heretage is an heretable Right, which one enjoys as Heir to his Predecessor. Conquest is not only that which one acquires by his own Means and Industry, but also, that which is deriv'd to him by Gift from his Parents, or others, to which he would not have otherwise succeeded. Upon which Ac-

count Conquest is called Feudum novum.

3. Some Things are fimply heretable to all Intents and Purposes. Such are Lands, Edifices, growing Trees, the Surface, and all the natural Fruits of the Earth, while unseparated from it, Dispositions, or other Land Rights, with a Precept of Seafin, or Obligement to infeft, tho' not completed by Infeftment, perfonal Bonds, excluding Executors, Sums appointed to be imployed upon Land, or real Security. Yea, a Destination by Way of Tailzie, in a Bond granted to a Man and his Wife, and the longest Liver of them two in Liferent, and to the Heirs to be procreated betwixt them in Fee, which failing, to the Wife's Heirs and Affigneys, makes it heretable, without either Infeftment, or Obligement to infeft.

• 4. Some Things are simply moveable, as Species of Goods, (Heirship excepted) Ships, or Shares thereof, Bags of Money, Bonds or Tickets not bearing Annualrent, bygone Rents of Land, Annualrents of all Bonds, and industrial Fruits of the Earth, whether growing or reaped, Clauses of Relief in heretable Bonds, and the Jus Mariti. Again, a Sum may be sufficient of the sum of

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Natural moveable, and yet heretably fecured: As bygone Annualrents due by Infeftment of Annualrent, which Executors may recover by

an Action of poinding the Ground.

5. Some Rights are heretable and moveable in a different Respect. Thus personal Bonds bearing Annualrent are moveable as to Executors, unless these be expresly excluded, or the Debtor expresly oblig'd to infest the Creditor: but heretable as to the Fisk, and the Creditor's Relict (a). Other Things, astemporary Rights or Obligements for a Course of Time, viz. Tacks, Pensions, or other annual Prestations, are moveable quoad the Fisk, and heretable, with Respect to Heirs and Executors. Bonds may be heretable as to the Creditor and his Heirs, and moveable as to the Debtor, fuch as a personal Bond, payable to one and his Heirs, excluding Executors.

6. The Sum in a Bond heretable by Infestment, becomes moveable by the Creditor's obtaining a Decreet for Payment, or requiring Payment by a Charge, or requisition. But a Charge upon a Bond, wherein executors are expressly excluded, will not make the Sum moveable. Nor will Requisition used, or a Charge given by a Wife, for an heretable Debt due to her, make it moveable. Nor yet do Sums for which a Wadset, or heretable Bond was granted, become moveable, by the Debtor's configning the same, after an Order of Redemption us'd,

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⁽⁴⁾ Act 32. Par. 1. Seff. 1. ch. II.

till there be a Declaration thereon, or till the Creditor accept of the Confignation, or infift to get up the confign'd Money. Altho' a Creditor by Requisition, or Charge for heretable Sums, doth, for the Time, pass from his heretable Security: Yet, whenever he pleases to pass from the Requisition, or Charge expressly, or tacitly, by taking, after the Requisition, Annualment for subsequent Terms, his heretable Right reviveth, and is not excluded by interveening Rights.

7. Taking an heretable Bond of Corroboration, or adjudging for a Sum originally due by a moveable Bond, makes it heretable. But Sums ab initio heretable, may be secured by an accessory moveable Right, as the Gift of the Debtor's Escheat, or a moveable Bond of Corroboration, without altering their Nature.

TIT. III.

Of absolute and limited Property.

A Bsolute Property is, when the Property and full Profits are in the same Person, and enjoyed by him independently, without being liable to pay any Acknowledgement for it to a Superior Lord, called plenum Dominium, or allodial Property. Thus are Moveables enjoy'd, and some heretable Rights, as Superiorities vested in the Sovereign, Churches and Church-Yards.

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2. Limited Property is, when one, called Superior, has the Dominium directum only of Lands, or other Kind of Heretage, without the Profit, called Superiority; and another, called Vassal, hath the Profit only, without the direct Property, called Dominium utile, for Payment of some Acknowledgement to the Superior, or direct Proprietor. This limited Property is called a Fee. When the Vassal makes over his Right to the Fee to another, to be held of himself; that other is called a Sub-vassal, to whom the first Vassal is immediate Superior, and the Vassal's Superior is call'd the Sub-vassal's mediate Superior.

3. Fees are divided, 1. By the Manner of Holding. 2. With Respect to the Vasial.

TIT. IV.

Fees distinguish'd by the Manner of Holding.

FES are thus divided. 1. Into Ward, Blench, Feu, Burgage, and Mortifi-

[1.] A Ward Fee hath its Denomination from the Ward of the Vassal; the chief Casualty salling to the Superior thereby, viz. a Right to the Mails and Duties of his Male Vassal's Lands, while he is Minor, and his Female Vassal's Lands till her Age of 14. This is the properest Feudal Right, called Servitium Militare, from the Original of Fees, which, at first, were granted for Military Service. Therefore all

Lands are prefum'd to hold Ward, where another Holding doth not appear express in the Charter. If the Superior hath transacted for a liquid Quota, or Annual-prestation, in Place of the Mails and Duties that fall to him by the Ward, the Holding is called Taxt-ward. When a Sub-vassal holds Ward of a Ward-vassal, this is called Black-ward, or Ward upon Ward.

[2.] A Blench Fee is, when the Vassal stands obliged only to pay an elusory Duty to the Superior for Acknowledgement, as a Rose, a Peny, or pair of Gloves, &c. Nomine alba firma, in Name of Blench-duty; and ordinarily with this Quality, Si petatur tantum.

[3.] Feu-holding is, that whereby a Vassal is bound to pay to the Superior a yearly Sum of Money, or Quantity of Victual, &c. Nomine Feudi firma, in Name of Feu-duty. Feu-holding is not derived from the old Feudal Law; but from the Emphyteutical Leafe, or Leafe for Perpetuity in the civil and common Laws; whereby barren Ground is given, by the Proprietar, to another, to be possessed for ever, upon Condition of his cultivating and improving by Planting and Policy, and paying a small yearly Rent or Pension, called Canon. For if no Part of the Feu-duty be paid for two whole Years, the Vassal loseth his Feu, conform to the Civil and Canon Law (a). Feus may be granted by any Persons of their Property,

(a) Act 240. Par. 15. 7. VI.

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ty. Feus of the Crown's annexed Property, without a previous Dissolution in Parliament, are null (a). Nor can it be feued out after a Dissolution, with Diminution of the Rental (b), but must be done with an Augmentation of it (e). Prelates could not feu out any Part of their Benefices, without Confent of the Majority of the Members of the Chapter or Convent: Nor inferior beneficed Perfons any Part of theirs; without Consent of their Patrons.

[4.] Burgage-holding is an Obligation upon Burghs Royal, to pay to the King, by their Charters of Erection, the Duty of Watching and Warding, &c. not only for their common Lands, or other Rights of the Corporation, but also for Tenements holden Burgage by Particular Persons infest therein; the Burgh being Vassal to the Sovereign, and not the particular Burgeffes.

[5.] Mortification is that Manner of holding, whereby Colleges, Hospitals, or others are bound to pay the Duty of Praces & Lachrima for Lands, or others mortified to them for a pious Use.

2. Fees are distinguished by the Manner of Holding, into Publick and Private, or Base Fees.

1. A publick Fee is that, which is given to be held of the Giver's Superior. 'Tis fo called from the supposed Notoriety thereof. It 15

⁽a) Act 240. Par. 15. J. VI. (b) Act 6. Par. 9. J. VI. (c) Act 237. Par. 15. J. VI. Act 10. Par. 1. Cb. I.

is also term'd a Right a me, because it is to be held a me (the Disponer) de superiore meo.

[2]. A private or base Fee is that, which is granted by a Vassal to be held of himself. Tis so called, because latent or lower, and at a further Remove from the original Right held of the Sovereign, the highest Superior, than a Fee held of the Disponer's Superior is. It carries also the Name of a Right de me, because it is to be held de me (the Disponer) & successoribus meis. Base Fees required Possession to complete them, for preventing clandestine and collusive Rights, till the Year 1693, when Insestments, whether Publick or Base, cloathed with Possession, or not, were declared preservable, according to the Priority of the Registration of the Seasins (a).

TIT. V.

Fees distinguished with Respect to the Vasfal.

FEES differenced with Respect to the Vassal, are 1. Simple and tailzied Fees.

2. Fees granted to one Person and his Heirs, and those conceived in Favour of more Persons and their Heirs.

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SECT. I.

Of simple and tailzied Fees.

in Favours of one and his Heirs whatsoever, that is, his Heirs of Line, who succeed by Law.

2. A tailzied Fee is that, which the Owner, by exercifing his inherent Right of disposing of his Property, fettles upon others than those to whom it would have descended by Law. The Custom of tailzieing Estates was handed down to us from Normandy; and the Word Tailzie, from the French Tailler, imports a. cutting off the lineal Heirs. A Tailzie is properly made, by naming several Persons to fucceed one after another; as when Lands are disponed to one, and the Heirs of his Body, or to his Heirs Male, or his Heirs of such a Marriage, which failing, to another Person named, and to his Heirs of fuch a Kind; and fo to a Third, or further, according to the Humour of the Disponer, as he thinks fit to make the Tailzie long or short. The Person in Favour of whom Lands are tailzied in the first place, is called The Institute, or first Member of the Tailzie; and those to whom, failing him and his Heirs, they are provided to go, are called Substitutes, or second, third, &c. Members of the Tailzie. Seeing Tailzies divert

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Succession from the natural and common Channel, they are ever strictly interpreted.

3. Persons sometimes grant Bonds, or enter into Contracts, whereby they oblige themselves, and their Heirs of Line, to relign their Estates in Favour of such and such Heirs of Tailzie. Which Bond or Contract, if gratuitous, binds the Granter once to Tailzie, tho' not to continue the Tailzie: But if made for

an onerous Cause, cannot be altered.

4. Where a formal Tailzie is made, if a Proprietar do only Substitute the Persons who are to succeed to him one after another, which is called, A simple Tailzie: This Destination may be broke or altered by the Maker, or by any of the succeeding Members, even tho' Inhibition were ferved thereon. If the Maker of the Tailzie oblige himself and his Heirs of Intail not to alienate or alter, neither he, nor any of these Heirs can do so, by any volunrary or gratuitous Deed, which may be reduced upon the Act of Parliament 1621, as done in Defraud of the Heirs Substitute, who are Creditors by the Claufe. But the Maker of a Tailzie and his Heirs may, notwithstanding of an Obligement therein, not to alter or alienate, dispone for a necessary onerous Cause, or the Lands may be adjudged for their Debt: Tho' Inhibition us'd upon the Clause makes all subsequent Deeds, even for onerous Causes, reducible. Sometimes the Clauses not to alienate or alter, or contract Debt, are backed with Claufes

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mon Clauses irritant and resolutive. A Clause, Irritant is, a Provision that a Right or Deed thall enter be null and reducible for the future, if fomelves, thing be done or omitted by the Receiver. r E-Clause resolutive is, a Provision declaring a s of Right or Deed to have been mull from the gra-Beginning, upon the Receiver's doing, or failtho' ing to perform what is express'd, or in some oe for ther Event. When a Tailzie is made with itritant and resolutive Clauses inserted in the Pro-Procuratory of Refignation, Charter, and Pre-) are cept of Safine, that it shall not only be unlawhich ful to the Heirs to sell, anailzie, or dispone, tion or contract Debt, or do any other Deed whereby by the Lands may be adjudged or evicted from Inthe other Substitutes in the Tailzie, or the er of Succession frustrated; but also, that the Deeds of Contravention shall be mull, and that the nor next Heir of Tailzie may purfue Declarator thereof, passing by the Contraveener without representing him, and serve Heir to the Person who died last infest in the Fee, and did not Contraveen. This Tailzie being judicially authorized of Course by the Lords of Session, and recorded in the Register of Tailzies, and the irritant Clauses repeated in all after Conveyances of the tailzied Estate to any of the Heirs of Tailzie, the Tailzie is real and effectual, both against the Contraveener and his Heirs, and against their Creditors by Apprising or Adjudication, or other Titles (a). Again,

⁽⁴⁾ Act 22. Seff. 1. Par. J. VII.

the omitting to repeat the irritant Clauses in subsequent Conveyances to any Member of the Tailzie, imports a Contravention against the Omitter and his Heirs, to make the E-state sall to the next Heir of Tailzie; but not against Creditors and singular Successors, contracting bona Fide with the Persons who stood insert in the Estate without any Irritancy or resolutive Clause in the Body of his Right (a). A Deed done by a Member of Tailzie, before the Succession sell to him, doth not import an Irritancy.

5. If a contraveening Member of Tailzie is cut off by a Declarator of Irritancy, all the Heirs of his Body are thereby excluded: But, if the Contraveener's Son was nominatim substituted in the Tailzie, the Son would succeed,

tho' the Father be cut off.

6. When a Tailzie is made with Clauses irritant to certain Heirs successively; All which failing, to return to the Divisor's Heirs and Assigns whatsoever: These Heirs and Assigns in the last Termination, are not, upon the Return of the Fee to them, failing the Institute and other Substitutes, affected with the Irritancies. For then the tailzied Fee becomes simple.

7. When a Tailzie doth not terminate in Heirs whatsoever; and all the Heirs therein specified do fail, the Fee should not fall to the King or other Superior, as ultimus Hares,

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(a) 3 (b) Vi while any Person can make up a Title thereto, as Heir of Line; the it was once otherwise decided (a). Which rigorous Decision, directly crossing the Design of the Maker of the Tailzie, and forfeiting a Man for the Error and Omission of a Notary or Writer, to insert the Clause; which failing, to such a Person's Heirs whatsoever, hath been justly disapprov'd as anomalism by average I among the provides a property of the control of the cont

molous, by our greatest Lawyers.

8. A Tailzie is broke, by the Maker's referving a Faculty to alter or innovate, at any Time in his Life, & etiam in articulo mortis. In which Case, if the Tailzie be made in Favour of a Stranger, or one who is not alioqui Successurus, the Maker may alter upon Deathbed: But, if one hath conceived a Tailzie in Favour of his Heir at Law, who would fucceed, tho' it had not been made, he cannot divert the Succession by any Deed on Deathbed, notwithstanding the Reservation to alter in Articulo mortis. A Power reserved to alter at any Time in the Life of the Maker of the Tailzie, without the Addition, & in Articulo mortis, implies only, that he can do fo in Liege Pouftie.

9. The Effect that Forfeiture of an Heir of Tailzie, hath, with Respect to Substitutes claiming after him, is set forth in another

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⁽⁴⁾ July 1688, Tenant contra Tenant, and the L. of Drum.
(b) Vid. Part III. Book I. Ch. 3.

SECT. II.

Of Fees granted to one Person and his Heirs, and those conceived in Favour of more Persons and their Heirs.

WE have in Scotland, not only Fees of Lands and Heritage, but also Fees of Money or Debts, called Feoda Pecunia vel Nominum: Of both which, by Reason of their Affinity in the general Analogy of Law, I shall here discourse.

Fees are granted to more Persons, either jointly, called conjunct Fees, or subordinately.

Conjunct Fees are conceived. either in Favour of Strangers and their Heirs, or to a Man

and his Wife, and their Heirs.

1. Where Fees are granted to two or more Brothers, or Strangers jointly and their Heirs, all are Fiars equally, or for their Proportions, and possess the Fees pro Indiviso, till a Divifion thereof be made to them, by the Action. Communi dividundo. If a Bond be conceived simply to Persons in conjunct Fee, and the Heirs of one of them; the Person to whose Heirs the Sum is provided, is regularly understood to be Fiar. But this Rule holds only presumptively, and may be overballanced by stronger Presumptions: As, when a Father takes Security in Lands to himself, and his Son nominatim, and the Son's Heirs, the Father is Fiar. Where there are divers Degrees of Substitution of the Heirs of several Persons, the Person ... Person

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ather is Son her is Subs, the Person Person whose Heirs are first in the Institution or Substitution, is Fiar; and both these his own Heirs, and the others substitute after them in secundis Tabulus, are Heirs of Provision to that Fiar.

2. When Lands are disponed, or Sums of Money payable to a Man and his Wife in conjunct Fee and Liferent, and their Heirs; or their Heirs in Fee; the Husband is Fiar, and the Wife's conjunct Fee resolves only in a Liferent: Which Interpretation of Law is founded upon the Husband's Prerogative and Dignity of his Person, to whom the Wife is subjected, as her Head. Yea, a Clause in a Bond bearing a Sum to have been borrowed from a Man and his Wife, and making it payable to the longest Liver of them two in conjunct Fee, and to the Heirs gotten between them, or their Affigns; which failing, to the Heirs and Affigns of the last Liver, makes the Husband Fiar, and the Wife Liferenter, albeit she be the last Liver. But this Presumption, of the Man's being Fiar, may be taken off by a stronger contrary Prefumption, where it is evident that the Fee was the Wife's, and a Liferent only defigned for the Husband. As, if an Heires should, without any onerous Cause, resign an Estate fallen to her after her Marriage, in Favour of herself and Husband, the longest Liver of them in conjunct Fee, and their Heirs, and thereupon both of them be infeft; the Wife would be fole Fiar, and the Husband Liferenter only.

Or,

Or, if the Reversion of Lands belonging heretably to the Wife, were taken to her Husband and her, and their Heirs; the Wife's Heirs would exclude the Husband's. And, where a Sum is provided to a Man and his Wife, and their Heirs of the Marriage, which failing, to the Wife's Heirs and Assigns; she is Fiar: Because, none other than the Fiar can assign.

3. A Right to Moveables, conceived in Favour of a Man and his Wife, and their Heirs, must divide betwixt both their Heirs, who suc-

ceed equally thereto.

CHAP. III.

The general Ways of acquiring Right to Things, consisting of Property and Possession.

Right to Things is acquired to one.

1. By his Fact and Deed called Occupancy.

2. By Accession to what already belongs to him.

3. By the Deed of another.

1. Occupancy is One's taking Possession of Things belonging to no private Person, by Hunting, Fowling, or Fishing in Places where he hath Right to do so; or, by finding a Thing lost, whereof the true Owner doth not appear to claim it, after all Diligence used to discover him by Proclamation.

2. Accession is the acquiring Right to an accessory, by being Proprietar of the principal

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pal Thing. Accession is either natural, or artificial. Natural Accession is either Procreation. whereby the Birth of Female Creatures that belong to us, are ours, according to the Rule Partus seguitur ventrem; or Alluvion, which is the insensible Accretion of Earth to Ground, bordering on a River, by the Force of the Water. Artificial Accession is the adding one Person's Thing to another's. In which Case, that which is added for the Sake of the other. as Ornament upon a Garment, or in Dubio, that which is of less Value, is reputed accessory, and follows the Principal: So, as the Owner of the former must yield up the Possession to the Proprietor of the latter. But he, who thus acquires the Property of other Mens Materials, is liable to the Owner, in so far, as he is a Gainer. Again, Buildings belong to those, who are Masters of the Ground on which they are built. But, a Recompence is allowed to the Builder for his Work, and Materials that accrue to the Ground, in so far, as the same is profitable to the Heretor of the Ground, by affording him a greater Rent for it.

3. A Right to Things, is acquired to one by the Deed of another, either in Immoveables, or Moveables. Immoveables are acquired by real and heretable Rights, partly vested in Vassals, partly in Superiors. Moveables are acquired by Obligations and personal Rights.

BOOK

Part II. Institutes of the Book II



BOOK II.

Of real and heretable Rights.

CHAP. I.

How real and heretable Rights are constituted.



EAL and heretable Rights are constituted by Charter and Seasin, which jointly are called INFEU-DATION, INFEFTMENT, OF IN-ESTITURE.

T I T. I.

Of Charters.

Charter is in Effect, a Disposition made by a Superior to his Vassal, for some Thing to be performed or paid by him.

Charters are distinguished into original

Charters, and Charters by Progress.

An original Charter is that, whereby a Fee is first constituted.

A Charter by Progress, is a renewed Dispofition of the Fee. Such is either voluntary, as a Charter upon Refignation, and a Charter

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of Confirmation; or necessary, which the Superior can be forced to grant, as a Charter in Obedience to a Charge upon an Apprising or Adjudication.

A Charter of Resignation is granted upon the Vassal's resigning his Property, in the Hands of the Superior ad perpetuam Remanentiam, or

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Charters of Confirmation are those, that ratify Rights formerly made to Vassals, by their Superiors, or by the Vassals to some other Persons. Charters confirming Rights granted by Vassals, are either Charters of Confirmation of publick Rights, or Charters confirming base

Rights.

In some Charters by Progress, a Clause de Novodamus, useth to be inserted, which dispones the Fee, as by an original Right, and hath the Effect thereof. 'Tis extended to the utmost against Subject Superiors: And against the King, to secure the Property from being evicted by Nullities, Forseiture, Recognition, Purpresture, Disclamation. But it doth not exclude any Casuality burdening only the Property; as Ward, Marriage, Nonentry, and Listerent Escheat, unless the same be particularly expressed.

A Charter consists ordinarily of six Parts.

1. The Narrative. 2. Dispositive Chause. 3.

Tenendas. 4. Reddendo. 5. Clause of War-

randice. 6. Precept of Seasin.

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⁽a) Part III. B. I. Ch. 1. Sect. 1.

for which it is granted. The Reason moving to grant a Charter, is either Love and Favour, which is called a lucrative Cause; or a Price, or good Deeds, or valuable Consideration, which is term'd an onerous Cause. But, tho no Cause be express'd; or, tho the Cause infinuated be not true, the Charter is good.

disponed. Regularly the Charter gives Right to nothing, but what is, at least, implied in this Clause, tho' inserted in other Parts of the Charter. The Parts of Lands disponed, are all express'd in bounding Charters, so called, because they mention the Marches of what is disponed. In other Charters, Lands of a certain Denomination are mentioned, and several particular Parts thereof known, only by the Neighbourhood, or by March-stones, are couched under the Words, with Parts and Pertinents.

3. The Tenendas in a Charter is, a Clause expressing of what Superior the Lands, &c. are to be held; so called from the first Words thereof. Which, if it contain any Thing not in the dispositive Clause, gives the Vasial no Right to it.

4. The Reddendo is, that Clause bearing what the Vassal is to do, or to pay the Superior: So called from the first Word thereof: The various Conception of this Clause, gives Rise to the Difference of Holdings.

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by the Granter of the Charter obligeth himfelf to warrant or make good the Thing granted to the Receiver. Which is a common Clause both in personal and real Rights.

Warrandice is either personal or real. [1.] Personal Warrandice is, an Obligement to warrant personally. Of this there are several Kinds, 1. Warrandice from the Guarantee's future Deeds, called fimple Warrandice. 22 Warrandige from Fact and Deed, which is that the Guarantee hath not done, nor shall do any Thing prejudicial to the Right warranted. 3. Absolute Warrandice, that is Warrandice at all Hands, and against all Mortals. Personal Warrandice is either expressed or implied. Warrandice is implied or understood, according as the Deed is onerous or gratuitous; In gratuitous Deeds, simple Warrandice from future voluntary Facts is implied. An adequate onerous Caufe infers always abfolute Warrandice, tho' no Warrandice be expressed.

[2.] Real Warrandice is, when Infeftment in one Tenement is given in Security of another

[3.] The Effect of Warrandice is, That if the Thing warranted be evicted, the Person from whom it was evicted, hath Recourse against the Guarantee, by an Action of Warrandice for making up the Loss. To found which Action, when any Suit is moved for evicting the Right warranted, Intimation must

be made to the Person liable in Warrandice, that he may defend, if he had any relevant Defence against Eviction. Absolute Warrandice is never extended to future Statutory Laws, but incurred only by Eviction for a Cause anterior to it. Such Warrandice in Asfignations imports only, that the Debt is truly due, and not that the Debtor is Solvent. No Warrandice takes effect, where Distress and Eviction happen thro' default of the Party warranted. In Charters granted by the King as supreme Superior jure corona, (which are gratuitous) Warrandice hath no Effect. But in Charters of Lands, which are no Part of the Crown-Revenue, or annexed Property, His Majesty utitur jure privato.

-06. The Precept of Seisin is a Command by the Superior to his Baillie, to give Seifin to the Vaffal, or to his Acturney. Which may be given not only to the Obtainer of the Precept, but allo to his Heir or Affigney, as well after, as before the Death of the Granter of the Precept, or Party to whom it was granted, or both (a).

Charters granted by Subaltern Superiors, may bear a Clause of Registration, to be recorded only in the Books of Session (b). homowheath it was expended hath thecounte as

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TIT. II.

Of Seifins.

Seisin is Delivery of Possession of the Subject contained in the Charter, by the Superior, or his Baillie, to the Vassal, or his Acturney, upon the Ground of the Fee. Which is done by delivering the proper Symbols, as a little Earth and Stone, for Land; the Clap and Happer, for a Mill; a Sheaf of Corn, for Tythes; a Net, for a Fishing; a Penny Money, for an Annualrent, &c. in Presence of a publick Notary and two Witnesses, upon which the Vassal takes Instruments in the Notaries Hand, who extends a Writ, called An Instrument of Seisin. But Seisin within Burgh should be given by the Baillies and common Clerk of the Burgh (a).

2. When this fymbolical Possession is given by the Superior himself, or in his Presence by his Baillie, 'tis called Seisin propriis manibus.

3. Instruments of Seisin taken in the Country, must be recorded in the general Register at Edinburgh, or in the particular Register of the Shire, Stuartry or Regality where the Lands ly (b), and Seisins, given within Burgh, in the Town-Clerk's Books (c), within 60 Days after the Date thereof; otherwise, they are null, in H 2

⁽⁴⁾ Act 27. Par. 1. 9. VI. (b) Act 16. Par. 22. 9. VI.

Prejudice of fingular Successors acquiring Posterior Rights, and effectual only against the Granter and his Heirs.

4. The Superior, if a Subject, is still infest, as well as the Vassal, in the Land it self, without mention of the Superiority, which is only a consequence of his granting the Fee. But the King wants not to be infeft. For His Majesty is infest, jure Corona, in all Lands, and his being King, is equivalent to Infeftment.

5. Seifin, being only the Affertion of a Notary, proves not, unless the Warrand thereof, mediate, or immediate, be produced, as the Disposition or Precept whereupon it proceeded. But none are obliged to produce Precepts of Seisin after 40 Years Possession (a). Seisin by a Superior to his Vassal, or by a Husband to his Wife, for a fuitable Provision, is sustained, without any Warrand under the Granter's Hand, in a Competition with his Reprefentatives. A Seisin is a sufficient Title against Tenants at the Instance of their Master known to possess.

The Fee being thus stated by the Superior in the Person of his Vastal, by Charter and Seisin; It falls next to be considered, what the Vassal gets thereby, and what remains with, and belongs to the Superior, called, The Superi-

ority, and Casualities thereof.

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(4) Act 214. Par. 14. J. VI.

CHAP. II.

Of the Right established in the Vassal's Person by Charter and Seisin.

Right to nothing, except what is, at least virtually, included in the dispositive Clause of the Charter. For understanding whereof it is to be observed.

1. That somethings cannot at all be alienated by the King, as the annexed Property, and those publick Rights, called Regalia Majora, viz. The Power of making War and Peace, creating Magistrates, naturalizing Strangers, legitimating Bastards, and remitting Crimes.

2. Other Things the Sovereign can dispone only by express Grant; and when so disponed to a Subject, can only be passed over in that Manner by him to another. Such are, 1. Some Regalia, as Mines of Gold and Silver, or fine Lead (a), Treasures, the Privilege of killing Swans, and Right to Escheats. 2. Union and Erection.

Union is a Clause in the King's Charter, uniting expressy in one Tenement Lands lying discontigue, or contiguous Tenements of several Kinds, or held of different Superiors, that one Seisin may serve for them all. If a Place

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for taking Seisin be appointed, that must be observed; and if no Place be mentioned, Seisin may be given upon any Part of the united Lands.

Erection is the King's erecting Lands and other Things, into the Dignity of a Barony, which implies Union, tho' not express'd.

No Subject can make such Union or Erection, but only the Sovereign, either in an original Charter, or by Consirmation of a Vassal's Charter of the Lands and Tenements; which doth not alter the Jurisdiction of the Shire, &c. where the Lands united or erected ly. Union or Erection is not dissolved by the Vassals alienating part of the Lands to be held of the Superior, but the Part disponed only is dissolved. The Privilege of a Barony is not communicable by any Subaltern base Rights and Insertments; the Union implied therein may be so communicated.

3. Some particulars are, tho' not express'd, virtually carried in a Charter. The Clause with Parts and Pertinents in the Charter of a Barony, comprehends civil Jurisdiction and Blood-wits, or lesser Crimes, Fortalices, such as the King's Castles in the keeping of Constables, Forrests, Salmond-sishing, Mills, and the Privilege of setting up Hostelries. Such a Clause in ordinary Charters, comprehends every Part of the Lands disponed a Calo ad Centrum, particularly Wood and Coal, with all Things accustomed to sollow the Lands, ex-

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except cept what is referv'd by Law or Paction: As Mannor Places for Habitation or Conveniency, Barns, Stables, and Lands; or other Things possessed, as Pertinents for the space of 40 Years. tho' not contiguous. One, having a bounding Charter, cannot prescribe a Right to any thing without the Boundary, as Part and Pertinent of Lands contained therein : But Prescription may adject what is within the Bounding, to another Tenement, as Part and Pertinent thereof.

4. The Vassal hath not only Right to what the dispositive Clause entitles him to directly, but also to several Powers inherent by confequence in the Right of Property, as to dispose of the Subject disponed, redeemably or irredeemably, to burden it with Services, fet Tacks thereof, put in and remove Tenents, Oc. according to Law.

CHAP. III.

Concerning Superiority, and the Casualities thereof.

Superior may pursue Reduction and Improbation against his Vassals, or others claiming under them, who will be forced to produce their Rights otherwife they will be reduced and improven. He needs not instruct his Right to the Superiority in a Process at his instance, against Vassals who H 4 derive

derive their Infeftment from him: But the Vaffals must either acknowledge it, or disclaim him upon their Peril. He hath for the Duty and Service contain'd in their Reddendo's, not only personal Action against the Vasials, but also real Action of Poinding the Ground against fingular Successors. But he cannot claim annual Services, or any Confideration for them, unless these be required yearly in due Time. A Superior is not oblig'd to receive Vassals upon Resignation, or by Confirmation: But he is bound either to receive Apprifers or Adjugers, as his Vassals, upon Offer of a Charter with a Year's Rent, or to pay the Debt, and take the Land to himself (a). No Superior can interpose another betwixt him and his Vastal, to make that other his immediate Vaffal.

Some Casualities of Superiority are common to all Manner of Holdings; others are common to most of Holdings; and a third Sort

are appropriated to particular Fees.

TIT. I.

Casualities of Superiority common to all Holdings.

These are such as carry the Right of the Fee it self back to the Superior, and are called Recognition in general, viz. Disclamation and Purpresture.

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(4) Ad 37. Par. 5. 7. III.

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denying his Superior to be his Superior. This is done either verbally in Judgement, or really out of Judgment, by taking a Charter from another Superior. But any probable Ground of Ignorance will prevent this Forfeiture's taking Effect. A Superior disclaim'd in a Suit at his Instance, against a Person as his Vassal for many Casualities of Superiority, hath it in his Option, either to admit his Disclamation, and take his Advantage thereby, or to instruct his Title and proceed in the Action; but he cannot do both.

3. Purpresture or Purprusion, is the Vassal's usurping or encroaching upon the Superior's

known uncontroverted Property.

4. Upon either of which two Grounds of Disclamation or Purprusion, the Superior may challenge the Property of the Fee as his own, in a Declarator of general Recognition.

TIT. II.

Casualities common to most of Holdings:

These are such as entitle the Superior to the Profits of the Fee for a Time, viz. Non-Entry, Relief, and Liferent Escheat, which I say are common to most of Holdings, because they don't take place in Burgage of Mortification; in Respect, the Vassal there, being a Society or Corporation, never dies, and

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so can neither be liable to Non-Entry, nor Liferent-Escheat.

SECT. I.

Non-Entry.

1. Nonentry is a Casuality, by which a Superior has Right to the Mails and Duties of the Vassal's Lands, when the Fee is void through his decease, and his Heirs neglect to Enter thereto, when he might, and should do it; or void by Reduction of the en-

ter'd Vassal's Right.

2. The Superior, or his Donatary cannot enter to Possession of the void Fee, till he obtain a general Declarator of Nonentry. But a Superior in Possession by Ward of his Vassal, may continue his Possession, without Declarator, for three Terms subsequent to it, upon the Account of Nonentry, if the Vassal don't enter sooner. Before Citation in the general Declarator, the Superior gets only the retoured Duty (a) in Lands holden Ward or Blench, and the Feu-Duty in a Feu Holding; and the Blench, or other Duty in an Infeftment of Annualrent (b). After Citation, the full Rent of the Lands, or whole Annualrent, in an Infeftment of Annualrent, is due to the Superior, whether the Holding be Ward Blench, or Feu. But this Claim to the full Rents being unfavourable,

(a) Vid. Part II. B. II. Ch. 5- (b) Act 42. Seff. 2. Par. W. & M.

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any probable Ground for excusing the Vassal from Contumacy, in not entring to the Fee, is sustained to restrict the Nonentry to the retoured Duties after Citation. Nonentry subsequent to Ward, carries only the retoured Duties, till Declarator, if the Superior, or his Donatary, was not in Possession by the Ward; and the sull Mails for three Terms subsequent to the Ward, if he was in Possession, and the Heir continue so long unentred. During these three Terms, which comprehend the Year of Relief, Nonentry is of the Nature of the Ward: And after expiring thereof, the Superior hath Right only to the retoured Duty, till Declarator.

3. Nonentry is excluded. 1. If the Fee be full, by a conjunct Fee, reserved Liferent, or other real Rights. 2. 'Tis excluded by the Superior's Confirmation of an Insestment to the Vassal, by his Predecessor, to be holden of the Superior. 3. Courtesy and Terce are sufficient Objections against it. 4. Three subsequent Seisins, granted voluntarily to three Heirs successively, import an exoneration from any anterior Claim of Nonentry. 5. The Superior's contumacious Resulal to insest the Vassal's Heir upon Precepts out of the Chancery, is a good Exception against Nonentry.

But Nonentry is not barr'd by Tacks set by the Vassal, nor by a Charter or Precept granted by the Superior, till Insestment follow thereon.

SECT.

SECT. II.

Relief.

RELIEF is that Acknowledgement the Heir pays to the Superior, for entring him as lawful Successor to the last Vassal. Which, in Blench, or Freeholdings, is only the Double of the Blench, or Feu-duty; in Ward Fees, the full Rent of the Lands, when the Superior is in Possession at the Vassal's Entry, and only the retoured Duty, if he be not then in Possession. Relief is not prefumed to be remitted by the Superior's entring his Vassal. And when due to the King, cannot be gifted (a): But is still exacted in Exchequer, tho' gifted. It is not only debitum fundi, but also affects the Vassal personally, who takes out the Precept for infefting himself, tho' he never take Infestment thereupon.

SECT. III.

of Escheat.

ESCHEAT, in general, signifies any Confiscation of one's Property; but our Law restricts it to Moveables and Liferents, whence we have the Terms of single and Liferent Escheat: Of both which (tho' the latter only falls within the design of this Section) I shall here

(a) Act 73. Par. 11. J. VI.

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here treat, because of their Contingency, and

arising from the same Foundation.

1. Single Escheat is a Forfeiture of all moveable Goods and Debts belonging, or owing to a Person denounc'd and registred at Horn for Debt, or Performance of a Deed or Promise the Time of the Denunciation, or that he shall acquire within Year and Day thereafter, till he be relaxed. Which fall to the King, unless the Rebel, or Outlaw live, and be denoune'd within a Regality, whereof the Lord is infeft with the Privilege of fingle Escheats falling by Horning; in which Case, the Casualty belongs to the Lord of Regality, who hath Right to the Rebels Goods and Gear that are moveable quoad Fiscum (a), wheresoever, both within and without the Regality. The Moveables falling under fingle Escheat, are Rents of Lands, or heretable Bonds, Clauses of Relief in such Bonds, Tacks not for Life, and Affignations to Liferent Tacks. Jus Mariti, and any Liferent vested in a Wife, falls under her Husband's fingle Escheat. A Superior's single Esceat carries his Vassal's Liferent Escheat fallen to the Superior, before he was Year and Day at the Horn. Liferent Escheat, or any other gifted Casualty, falls under the Donatarie's single Escheat.

2. Liferent Elcheat is a Forfeiture to the Superior of all Liferent Rights belonging to a Rebel, or Outlaw, who hath continued Year and

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⁽a) Vid. Sup. B. I. Ch. 2. Tit. 2. 5 5.

and Day at the Horn unrelaxed or loofed, for a civil or criminal Cause, he being reckoned civiliter mortuus. Which takes Effect from the Denunciation. Some of which Liferent Rights fall to the lawful Superior, whether the King, or a Subject; others to the King, Jure Corona. Law gives to the Superior, not only the Mails and Profits of all heretable Rights of Property. or Liferent, vested in the Rebel's Person by Infeftment, during all the Days of the Outlaw's natural Life (a); but also the Profits of Lands, wherein he might have been infeft as apparent Heir, if he enter at any Time thereafter; and fome heretable Rights, which by their Nature require no Infeftment, as Courtely and Terce. Albeit where a Superior becomes Outlaw after his Vassal's Liferent Escheat had fallen to him, the Vassal's Liferent would come under the Superior's single Escheat : Yet the Superior's Liferent Escheat carries the Liferent Escheat of his Vassal, accruing to the Superior, after he had been Year and Day at the Horn. The King has Right to, as bona vacantia, the Liferent Escheat of Ministers, comprehending the Profits of their Manses and Glebes, during their Lifetime, or Incumbency; the Liferent Escheat of heretable Rights in the Persons of Purchasers, that require to be completed by Infeftment, as Bonds, Contracts, Dispositions, if Infeftment hath not past upon them; Liferent Tacks of Lands or Tithes (b), and long Tacks

(a) Act 32. Par. 4. J. V. (b) Act 15. Par. 22. J. VI.

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(c) Bid. (c) Act

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Tacks for several nineteen Years, exceeding the longest Life of Man. But the Liferent Escheat of one of several Liferenters in a Tack, carries only the Benefit of it for his own Lifetime, without Prejudice to the other Liferenters (a). And albeit in Burgage Lands, the Burgh only is Vassal to the King; yet the Liferent Escheat of private Heretors of the Lands falls to the King.

3. Both fingle and Liferent Escheats use to be gifted, and the Donatary raises upon his Gift a Summons of general Declarator, wherein Decreet being obtained, he may pursue for Recovery of the Escheat Goods and Gear. But any Gift taken simulately to the Benefit of the Rebel, is null (b): Which is presumed from his Wife, Bairns, or Friends remaining in Possession to his Behoof (c), or from the Gifts being granted to his Children in Familia, or procured, and pass'd the Seals upon his Expences. In a Competition betwixt Donataries, the last Gift, if first Declared, is present.

I shall next inquire, How far the Debts and Deeds of the Rebel affect and burden his single

and Liferent Escheat.

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4. Single Escheat is affected, 1. By the Debt in the Horning upon which the Escheat sell, and the Expense thereof (d), which all Intrometters with the Escheat Goods are liable to pay (e). 2. Creditors doing Diligence before Declara-

(a) Act 15. Par. 22. 9. VI. (b) Act 135. Par. 12. 9. VI. (c) Bid. (d) Act 7. Par 4. Q. M. Act 75. Par. 6. 9. VI. (c) Act 143. Par. 12. 9. VI.

Declarator, for Debts prior to the Outlawry, or Commission of the Crime inferring Escheat, are preferr'd to the Donatary. 3. An Affignation, or Deed granted after Rebellion, and intimated before Declarator, in Implement of an Obligation to grant it before the Rebellion, doth exclude the Donatary. 4. An Affigney constitute after Denunciation, for a Debt anterior thereto, getting, before Declarator, Satisfaction of his Debt, by Payment, or renewed Bonds innovating the Rebel's Bond, is fecure, and not oblig'd to restore the same to the Donatary. 5. A Person getting Goods delivered to him by his Debtor at the Horn, before gifting of the Escheat, in Satisfaction of a just Debt, is preferr'd to the Donatary. Against whom also the Buyer of Goods bona fide from a Rebel, for a Price given, is fecure, and the Price accrueth to the Fisk. But, 6. No legal Diligence, or voluntary Right for Payment of any Debt contracted after Rebellion, or Affignation granted after Rebellion, for a Debt prior thereto, and intimated before Declaratof, will be preferr'd to the Donatary; if the Debt due to the Rebel remain unfatisfied, or not extinct.

Denunciation, renders all subsequent voluntary Deeds of the Rebel, whether within, or after Year and Day ineffectual against the King, or other Superior, claiming the Liferent, unless Relaxation be obtained in that Time. Thus,

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1. Infeftment for a Debt posterior to the Denunciation, or granted in cursu Rebellionis, for fatisfying anterior Debts, doth not exclude Liferent Escheat; unless the Rebel was specially obliged to grant such Infefrment before Rebellion. Nor doth a special anterior Obligement support a posterior Infestment conform, to make it exclude the Granter's Liferent Escheat. unless he be divested by the Infestment within Year and Day of the Denunciation. Nor yet doth Affignation to a Liferent Infeftment hinder the Liferenter's Escheat to fall thereafter, unless the Affignation be intimated, or the Affigny in Possession within that Time. 2. Creditors by Apprifing, or Adjudication, are not preferred to one claiming the Liferent Escheat, unless the Apprising or Adjudication be completed within Year and Day of the Denunciation, by Infeftment, or a Charge against the Superior. or a Signature presented to the Exchequer. which in Lands held of the King, is equivalent to a Charge. But Apprifing, or Adjudication, or other real Right led and completed in curfu Rebellionis, in Manner aforesaid, for Debts prior to the Rebellion, or Tacks fet before, and completed by Possession within the Year and Day, bar the Liferent Escheat. Yea, it doth not exclude Tacks fet during the Rebellion. without Diminution of the Rental. Ref Settlement State of the Sta

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TIT. III.

Cafualties appropriated to particular Fees.

CAfualties of special Fees arise either from the Nature of the Fee, or from express Paction.

1. The peculiar Casualties of Wardholding, arising from the Nature of the Fee, are, Ward,

special Recognition, and Marriage.

[1.] Ward is a Right to the full Rents of the Male Vassal's Lands, till he be 21 Years complete; and of a Female Vassal, till her Age of 14 (a); upon finding Caution not to waste, or destroy the Fee, or any Part or Pertinent thereof. This Casualty may be enjoy'd, either by the Superior himself, or by his Donatary claiming under him. In a Competition of Donataries, he who first intimates, or uses Diligence upon his Gift, is preferred. Ward needs no Declarator; but the Superior enters immediately to Possession of the Fee.

No private Deed of a Ward Vassal, without the Superior's Consent or Appointment of Law, can burden the Fee, while it is in the Hand of the Superior by the Ward. The Vasal's Debts don't affect it in that Interval. Rentals and Tacks set by the Vassal have only this Essect, That the Tenents cannot be remov'd till the next Whitsunday after the Ward salls, they paying to the Superior the accustomed Du-

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ty: After which Term, they may be disposses d, and their Tacks sleep, during the Ward; but revive against the Setter and his Heirs after it is ended, to take Effect for so many Years as were cut off by the Ward (a). But Ward is restrain'd by Terce of the Vassal's Relict, or the Courtesy of a Vassal's Husband.

Lands fall in Ward by the Death of an Apprifer or Adjudger infest, and in Possession, tho the Legal be current, and not by the Death of the Debtor, against whom such Diligence was us'd. Nor doth the Ward fall by the Death of an Adjudger infest, if not also in Possession.

Law obligeth the Superior, or his Donatary; to Aliment the Heir, according to his Estate and Quality, if he hath no other Feu or Blench Land to live on, or not so much of either as may entertain him; or, if he have no access to them by reason of Diligence of Creditors (b). For receiving Aliment, he is not bound to stay in the Superior's House.

properly so called, is a Casualty, that occasions a Ward-see, whether simple or taxed, to return to the Superior, by the Vassa's disponing it; of the major Part thereof, redeemably or ir-

redeemably, without his Confent.

A simple Disposition without Infestment, or Infestment taken from the Superior upon Resignation, or taken upon a Death-bed Disposition, or Alienation to the Vassal's apparent I 2

(a) A& 26. Par. 3. F. IV: (b) AA 29: Bids

Heir in the right Line, who is alioqui Successurus, or Alienation of Tithes, which are not Fundus, but onus fundo inhærens, or Infestment essentially null, as wanting the proper Symbols of Delivery, &c. doth not found Re-

cognition.

But it is incurr'd by the Vassal's Alienation to his Brother, tho' his nearest apparent Heir for the Time, or by Seisin, tho' null for some accidental Defect, as the not being registred, or not confirm'd by the Superior, &c. And albeit the Vassal do at first alienate only a part of his Lands, within the Half, without Consent of the Superior; (which he may do) yet, if he thereafter so alienate as much more, as counting the Part formerly disponed, doth exceed the half of his Fee, the whole falls under Recognition; and the first Purchaser will also lose his Right, which, tho' validly made at the Time, returns to the Superior ex post facto, by a retroactive Effect.

Recognition is not incurred by granting base Insestments within half of the Value of the Ward-Fee, tho' the Vassal by granting a posterior publick Insestment, did not retain the major Part. Nor is it incurred by the Deeds of an Appriser or Adjudger during the Course of the Legal, but by Deeds of the Reverser. Nor yet is it incurred by several Insestments, that reckoned jointly, exceed the half, unless these were all standing Deeds at one Time,

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Recognition is hindred by the Superior's Consent to the Alienation, either express by a Charter of Confirmation of the Alienation, or a Precept of Clare Constat granted to the Vasfal whose Lands had fallen in Recognition; or tacit, by requiring the new Vassal to perform Services due out of the Fee, or pursuing him to pay any Casualty of Superiority.

Recognition being incurred, the Fee opens to the Superior, with the Burden of anterior Inhibitions (a), but it excludes all subsequent legal Diligence used for onerous Causes, against the Vassal's Estate, tho before Declarator, and Tacks set without the Superior's Consent,

whether prior or posterior.

Before the Superior take Possession, the Recognition must be declared, either at the Instance of himself, or his Donatary, who in lieu of a Gift, gets a Disposition and Charter, and thereby becomes Vassal to the Superior. In a Competition of Donataries, he who is first insest is preferred to the obtainer of the first Declarator.

[3.] Marriage is a Casualty, due by the Heir of a Ward-Vassal unmarried at his Predecessors Death, to the Superior, who gets from the Heir two Years Rent of his free Estate, whether he offer him a March, or not; and suppose the Heir never marry, called, The

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(4) Act 15. Seff. 2. Par. J. VII.

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(4) Act 15. Seff. 2. Par. J. VII.

fingle avail of the Marriage; and three Years Rent, if the Heir, notwithstanding of a fuitable March offered to him by the Superior, do marry another, called The double Avail of the Marriage. Both which Avails are modified by the Lords of Session, according to the Vassal's Circumstances, with Respect not only to his Ward-Lands, but also to his other Estate, real or personal. The fingle Avail becomes not due for want of the Superior's Confent to the Vassal's Marriage; nor is it excluded by his being present at, or consenting to the Marriage, but ariseth from the Nature of the Fee. Yet it feems the Superior can ask no more upon this Score, than the Vassal gets of Tocher, if he do marry.

In order to make the double Avail due, a fit Person of a sound Mind, good Fame, and suitable Quality, having nothing in the Feature or Parts of the Body that may give a just Aversion, must be offered as a Match to the Vassal: Tho a Proportion of Means be not required. And notorial Instruments must be taken upon the Offer, and the Vassals resulal

for proving thereof.

Where the Vassal holds Ward-Lands of several Superiors, he is liable but for one Avail of the Marriage, which falls to the eldest Superior, that is, he from whom the Vassal had the first Fee. But if the King be one of the Superiors, his Majesty gets this indivisible Casulty, as presum d to be the eldest.

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The Avail of Marriage is debitum fundi, affecting singular Successors: But the modified with Respect to the Vassals whole free E-state, affects really no Part of it save the Ward-Fee. Nor doth it affect him personally.

2. The peculiar Casualty of Feu-holding, arising from the Nature of the Fee, is, That it no Part of the Vassal's Feu-duty be paid for two whole Years, he loses his Feu, as if a Clause irritant were specially ingross'd in the Feu Insestment (a). But the Lords of Session make this Difference betwixt Irritancies arising from the Statute only, and those expressed in the Insestment; by allowing the former, and not the latter, to be purged at the Bar.

3. Casualties in special Fees, arising from express Paction, vary, according as the Parties agree. Thus the Casualty of Marriage may be due by express Paction, or the Tenor of the Investiture, in other than Ward-Fees, as when Lands are holden Feu cum Maritagio.

Having cleared up the respective Rights of Vassals and Superiors, I shall in the next place consider the Burdens wherewith real and heritable Rights may be affected, which are either private, o publick.

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CHAP. IV.

Of private Burdens, wherewith real and heritable Rights may be affected.

RIVATE Burdens are those imposed either by Law, when such are declared real, by Act of Parliament, as the King's Annuity out of Tithes (a), or by the Agreement of Parties, as Services, &c.

TIT. I.

Concerning Services in General.

A Service is a Burden upon one's Property, whereby the Proprietor, for anothers Conveniency, is either forced to allow something to be done upon his Land or Tenement, or hindred from doing that, which may be profitable to himself.

2. Services are acquired either tacitly, or ex-

prefly.

Real or Predial Services are acquired tacitly, by Prescription, or 40 Years continued and peaceable Possession, without any Title in Writ from the Owner of the Land or Tenement subject to the Service. Which Possession is reckoned either from his constrained and involuntary Deeds; that is, such as are torc'd from him by Process at Law, or other Ways; or

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Ch. 4. Law of Scotland. Tit. I. 137

from Deeds of the Master of the Land or Tenement, to which the Service is due.

Services are acquired expresly by Writ.

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3. Real or Predial Services acquired by Writ, with either Possession or Insestment, is a complete Title. For the Title of such a Service neither persected by Possession, nor Insestment, is of no Essect against singular Successors, but only against the Granter and his Heirs. Our personal Services of Liferents, have no Force without Insestment against singular Successors: But Tacks clothed with Possession will defend the Tacksman against any Purchaser. Services constituted by Vassals upon their Property, are not essection, are of Force against the Superiors.

4. A Right of Service comprehends the Accessories, without which it cannot be us'd: As the Service of drawing Water out of a Well, implies the Service of a Passage to get to the Well.

5. Services come to cease either expresly, or tacitly.

A Service ceases expressly, by a Discharge, or Renunciation thereof.

Services cease tacitly, 1. By Consusion, or Consolidation, when one Person becomes absolute Proprietor of both the Land or Tenement that serves, and that for which the Service was established. For a Service is a Right upon the Estate of another Person; and the Right which one has over his own Estate, that is intirely at

his own Disposal, is not called a Service. 2. A Service expires whenever the Land or Tenement, which is subject to it, happens to perish.

3. A Service is lost by tolerating something to be done in the Land or Tenement subject to it, that is inconsistent with such a Service. 4. Freedom from a Service, may be acquired by Prescription, or 40 Years Forbearance to use it.

6. A possessory Action is competent upon 7 Years peaceable, and uninterrupted Possession of a Service, for continuing the same, till such Time as a Declarator of exemption is obtain'd. And where there hath been no Possession, or not so long Possession, there lies actio consessoria, or

a Declarator of Service.

The not claiming, or using a Service for the Space of seven Years, is the Foundation of a possessory Judgment to a Proprietor, or Liferenter, for excluding such a Service, till it be declared. And where seven Years immunity cannot be pretended, Astio negatoria, or a Declarator of Freedom and Exemption may be rais'd.

TIT. II.

Of the Several Kinds of Services.

There may be as many different Sorts of Services, as there are Ways of abridging any Person of the full and free Use of his Property. But these are commonly divided into Real or Predial, and Personal Services.

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A Real or Predial Service is a Burden affecting one Man's Land or Tenement, for the use of that of another's, directly; and in Consequence, for the Master's Behoof, as having Right to such Land or Tenement.

A Personal Service is a Burden upon one's Land, or Tenement, directly, for the Use and Enjoyment of another Person.

TIT. III.

Real or Predial Services,

R Eal Services are distinguish'd into Rural, and City Services.

SECT. I.

Of Rural Services.

RURAL Services, or those of Lands in the Country, are of several Kinds.

1. The Right of a Passage from one Place to another, either for a Man on Foot, or on Horseback, or for a Beast loaded, or for a Wagon.

2. Aqueduct, a Right to convey Water from one Ground to another, either in Pipes under Ground, or by a Rivulet above Ground.

3. Common Pasturage, a Right to seed Cattle on another's Ground, either in common with the Proprietor, or in common with others, excluding him. Which is establish'd either for a definite, or indefinite Number of Soums, or Yokes of Cattle; and doth not hinder the Proprietor

prictor to till and open the Ground, for other Ends of Property, unless he be restrain'd by Custom, or Consent, but only so much as remains Grass, may be us'd for Pasture by the Inhabitants of the Land, to which the Service is due Albeit common Pasturage be established indefinitely, without expressing the Number of Cattle allowed to be graz'd on the Common, it can reach no further, than to a proportionable Number, effeiring to the Rent of the Land to which the Service is due, that is, so many as it can hold at Fodder in Winter. The overcharging of a Common is prevented by Souming and Rouming; that is, by determining how many Soums the Ground Subject to the Service will conveniently pasture, and stinting the Inhabitants of every Roum of the Land, which hath Right to the Service, to a particular Number of these Soums, according to their Proportion.

4. Fuelling is a Right of casting Fail and Divot, i. e. of digging of Peats and Turves on, and pulling Heather from another Man's Ground.

5. Thirlage is a Service, whereby the Poffessors of Lands are bound to pay a Duty to a

certain Mill, for grinding their Grain.
The Duty paid for grinding in any Mill, is called Multure. Some come voluntarily to a Mill, where they think they can be best serv'd, and pay the ordinary Duty, called Outsucken, or Out-town Multure. Others are thirled, i. e. aftricted

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Ch. 4. Law of Scotland. Tit. 3. 91. 141

aftricted, or tied to bring their Grain to such a Mill, who mostly pay a Duty higher than ordinary, called Insucken, or Intown Multure: And sometimes a certain Duty is paid, whether they grind or not, called dry Multure. As Lands are disponed with their Pertinents; so Mills are disponed with Multures and Sequels.

Sequels comprehend, 1. That small Quantity of Grain due to the Mill Servants, called Knaveship, Lock and Bannock. 2. Services of maintaining and upholding the Mill-house, Mill-Dams, or Water-gates, and of bringing home Mill-stones; which those that are thirled

are oblig'd to do.

Thirlage is acquired either tacitly, or ex-

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'Tis acquired, r. Tacitly, by Payment, for the Space of 40 Years of dry Multures. 2. Possessor of Lands within a Barony of the King's Property, are understood to be aftricted to the sole Mill of that Barony, after immemorial Use of paying In-town Multures, and doing other Deeds of Thirlage, as repairing the Mill, casting the Mill-Dam, and carrying home Mill-Stones. But neither simple coming to another Mill, not of the King's Property, or coming to the King's Mill by the Possessor of Lands, without his Barony, and paying more than Out-town Multure, doth infer a Thirlage. Thirlage is acquired expressy by Writ, either without infestment, as by a Bond of Thirlage

and Possession; or by a Disposition and Insestment in a Mill, with the Multures of the Dis-

poner's Lands.

The Quantity of astricted Multure, extent of the Subject thirled, and Essect of Thirlage, are regulated by Custom, when the Thirlage is acquired by Custom; and regulated by Writ, when the Service is constitute by Writ. The Extent of Thirlage acquired by Writ varies, according to the different Tenor of the Writ. Disposition of the Mill of a Barony cum Multuris, or cum astrictis Multuris, brings the whole Barony under Thirlage, the sormerly free. But by Disposition of the Mill of a Barony, cum Multuris solitis et consuets, no Lands are understood to be thirled, that were not so before.

Thirlage of Lands simply affects omnia grand crescentia therein. But in a Thirlage of the whole Growth of the Ground, Tithe, not tholing Fire and Water within the Thirl, that is not steep'd nor kiln'd there, Farm paid to the Master, if not Grinded at another Mill, Seed and Horse Corn are excepted. And Thirlage of Investa et Illata, comprehends only what tholes Fire and Water, upon the Ground sub-

ject to the Service.

Contravention of Thirlage by grinding at another Mill, is purfued by Action for abstra-

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SECT. II.

Of City Services.

CITY Services, or Services of Houses, and

other Buildings, are fuch as thefe.

1. That the Wall of one Neighbour's House shall bear the Weight of another's Building, which Wall the Owner must repair for supporting that Building: For the Ground and Roof of a Building of several Stories belonging to different Persons, being common to all, the Owner of the lower Story stands obliged to uphold it as a Foundation to the Higher, and the Proprietor of the latter, to keep it as a Roof and Cover to the Former.

2. A Right to discharge Rain from of one's House upon his Neighbour's, either in Drops from the Eves, or in Spouts running thro' a jutting Gutter, or thro' a Pipe clap'd on against

the Wall.

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3. A Service for Lights, whereby one may open his Wall for receiving Light on the Side where his Neighbour's Tenement stands, and hinder his Neighbour from making them useless, by building or erecting Shades against them.

4. A Service against Lights, which gives a Right to hinder one to make Windows in his own Wall, to overlook his Neighbour, and

thereby take away his Privacy.

5. A Right to fix the Rafters or Beams of one's House in his Neighbour's Wall.

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TIT. IV.

Concerning personal Services.

PErsonal Services are Liferents, Insestments of Annualrent, Ground and Top Annuals, Insestments of Relief, Pensions and Tacks.

In treating of Liferents, the first of these Services, I propound to explain. 1. Liferents in general. 2. The several Kinds of Liferents.

SECT. I.

Of Liferents in general.

Thing, which is not our own for Life, without destroying, spoiling, or diminishing it.

2. Liferenters must therefore find Surety not to destroy the Buildings, Orchards, Woods, Stanks, Meadows or Dovecores, but to hold them in the same Case they receive them (a). A Liferenter is bound to aliment the Heir of the Estate liferented, if he hath not aliunde to entertain himself. And where an Estate is affected with several Liferents, all the Liferenters are liable pro rata (b).

3. The Fiar of a Sum liferented hath Power to uplift it, upon finding Surety to pay the

Annualrent to the Liferenter.

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4. Where Liferenters of Land Rent, or Mill Rent, of Property, or Annualrent, survive Whitsunday, or die in the Afternoon of that Day, their Executors have Right to the Half of the Liferent Duties for that Year, whether payable in Money or Victual; and where they survive Martinmass, or die upon that Term Day in the Asternoon, their Executors have Right to the Liferent Duties of that whole Year; whatever be the conventional Terms: If Liferenters labour the Lands themselves, their Executors have Right to the whole Rent of the Year, wherein their Death happens, whatever Time of the Year they die, if the Ground is laboured, and begun to be sown.

SECT. II.

Of the Several Kinds of Liferents.

LIFERENTS are either legal, or conventional, that is, acquired by Law, or Paction.

r. Liferents by Law are those, which Law creates to the Surviver of married Persons, out of the Estate of the deceased, viz. Teree and Courtesy.

[1.] Terce is a Relict's Right to the Liferent of a Third of Lands, Tithes, Wadlets and Annualrents, in Fee, whereof her Husband died infeft. But the Relict of a Person, whose Estate stands already affected with a Terce to his Predecessor's Widow, can claim only for her Terce, while the former Tercer lives, a Third Third of two Thirds of the Estate, called, upon that Account, the lesser Terce. Terce extends not to Lands within Burgh, or holden Burgage, nor to Feu-duties, or other Casualties of Superiority, or to Reversions, or Tacks, or Pa-

tronage.

A Terce is established by the Service of an Inquest of Fisteen sworn Men, called by the Judge Ordinary, where the Lands ly, upon a Brief or Precept out of the Chancery directed to him. Who are to try, 1. If the Bearer was lawful Wife to the deceased Person. In which Inquiry, they proceed according to Instruction, that she was held and reputed, or passed for a lawful Wife, without any Quarrel about her Marriage in her Husband's Lifetime (a). 2. If the Husband died insest in such Lands, &c. as Fiar.

A Terce being affigned to the Widow, she may either possess the Lands pro Indiviso, with the Proprietor, and uplift her Terce out of the whole Rent; or she may crave her Terce to be kenn'd, that is, divided from the rest be-

longing to him.

The Service entitles her to pursue Mails and Duties: But she cannot remove Tenants, till she be kenn'd. She hath a Right to her Terce from the next Term after her Husband's Death, upon which Account, the Time of his Death is specified in the Service.

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Any Provision granted by a Man to his Wife, excludes her from a Terce not expressly reserved (a). Law doth also cut off a Wife from a Terce, for committing Adultery, or wilful Desertion of her Husband. But Terce is not excluded by the Ward or Non-Entry of

the Husband's Heir.

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[2.] The Courtely of Scotland is a legal Right, which the Husband of an Heiress has to Liferent Lands and Heritages, the died infeft in; if there was a Child of the Marriage heard cry or weep, which is effectual. tho' the Child should die immediately thereafter before the Mother. The Courtely entitles the Husband, whether he be a first or fecond, to Liferent all his Wife's Heritage, (Burgage Lands excepted) ipfo jure Mariti. without Service or Infeftment, so as he may possess and remove Tenants. But the Courtely takes place only in Heritage, to which the Wife did succeed as Heir (whether of Line, Tailzie, or Provision) before, or during the Marriage, and not in that which the acquired by fingular Titles. Nor can a fecond Husband have this Courtefy, where his Wife hath an Heir of the first Marriage surviving. Courtely, as Terce, is affected with all Burdens that are real by Infeftment or Tack. But not by the Ward Non-Entry and Liferent Escheat of the Wife's Heir. It is excluded by the Husband's Adultery, or wilful Defertion of his Wife.

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(4) Act 10. Par. 3. Ch. II.

2. Conventional Liferents, or Liferents by Paction, are acquired, either by Refervation, when an Heritor dispones to one, reserving his own Liferent; or by a separate Right, when he dispones to a Person during all the Days of his Life; or by Way of Conjunct-Fee, when Lands are disponed, or Sums of Money provided to a Man and his Wife in conjunct Fee and Liferent, which imports only a Liferent to the Wife.

A Liferent of Lands by Reservation to one before inseft in the Property, needs no Insestment to complete, and make it effectual against singular Successors: But Liferents by conjunct Fee, or by separate Title, are of no Force against singular Successors, without Insestment. Insestments of Liferent may be conveyed by Assignation, voluntary or legal, without Insestment.

Liferenters by Refervation and by conjunct Fee have Right to the Casualties of Superiority; which a simple Liferenter by a separate Right has no Interest in.

SECT. III.

Of Infeftments of Annualrent, Ground and Top Annuals.

1. ANNUALRENT is a real Right to a Sum of Money, or Quantity of Victual issuing yearly out of Lands or Tenements, at one or different Terms. Whence it got the Name Ch. 4.

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Ch. 4. Law of Scotland. Tit. 4. 93. 149

Name of Annualrent; and he or she to whom such a Right belongs, is termed an Annualrenter.

2. Annualrents, tho' effectual Burdens upon the Properties of others, and therefore ranked here in the Class of Services, are acquired by Charters or Dispositions, and Seisins. Symbol of an Annualrent, if payable in Money, is a Peny, and if payable in Victual, is a parcel of Victual. Annualrents use not to be held Feu or Burgage, but either Ward or Blench, or by Mortification; and most frequently Blench for the Readendo of a Peny, by publick or base Infestments. Some Annualrents are constituted by Infestment distinct from that of the Property: Others by Refervation in Infestments of Property, where the Proprietor's Seisin serveth both. Some Annualrenters again are Creditors by Infeftment, in a principal Sum producing a yearly Annualrent: Others are Creditors only in an Annualrent, without any principal Sum. Annualrents are also either in Fee and Heritage, or in Liferent.

3. Annualrenters have a triple Security for their Payment, 1. One personal against the Debtor. 2. Another real against the Ground, whereof any Part may be poinded for this debitum Fundi, affecting unamquamque glebam. Where one hath an Infestment of Annualrent out of two Tenements promiscuously, the Annualrenter may take his whole Payment out of any one of them, tho' these chance to belong

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to different Heritors at the Time: In which Case, the Heritor of the distressed Tenement must be assigned to the Decreet, for recovering his Relief off the other Tenement pro rata. 3. An Annualrenter may pursue Intrometters with the Rents of the Lands personally, for Payment of bygone Annualrents, according to the Extent of their Intromissions.

4. Infeftments for Principal Sums and Annualrents thereof are extinguished. i. By the Deed of the Debtor, such as, 1. A Declarator of Redemption upon an Order used by him, as in Apprifings. 2. The Annualrenter's acquiring from the Debtor a Wadset, or other more noble Right of the Lands, unless that Right were evicted. 3. Such Infeftments are annulled by the Deed of the Creditor, as i. Not only by his Relignation, in the Hands of the Granter, as Superior; but also by a Renunciation recorded in the Register of Reverfions. 2. By Intromission with as much as might pay the principal Sum and preceeding Annualrents. Which Intromission may be proved by Witnesses, whether the Rent be Victual or Money; and is applied in the first place to extinguish past Annualrents, and then to cut off the principal Sum,

5. Infestments of Annualrent not relative to a Stock, can cease only by the Deeds of the

Creditor in Manner aforesaid.

6. Ground

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6. Ground Annuals, Feu Annuals, and Top Annuals, are mentioned in our Law (a): The true Meaning whereof is controverted by Lawyers. The most probable Notion of these seems to be this: That a Ground Annual is a yearly Duty payable out of the Ground and Property of Land, built or unbuilt, to the Disponer thereof, or to some other Person. A Feu Annual is a Duty paid out of some Land or Tenement by one as Vassal to a Superior. Top Annual is a certain Duty disponed by an Heritor out of his own House, to some other Person.

SECT. IV.

Of Penfions.

A Pension is a yearly Rent payable to one for a Time. Some Pensions have relation to a particular Subject or Fund of Payment; others are constitute indefinitely, without any fuch Respect. Some again are Ecclesiastical, and some Secular. An Ecclefiastical Pension is that, which is granted by a Church-man, payable out of his Benefice, whereof the Right being completed by Possession, or a Decreet conform in the Granter's Life, is effectual against Successors in Office, without any Decreet of Transferrence. Secular Pensions are granted either by the Sovereign's Gift under the Privy Seal, and payable out of the Treafury

(4) Act 10. Par. 4. Q. M.

fury, which are not arrestable: Or they are constituted by Subjects, either in their personal Bonds, or in heritable Bonds, payable out of the Rents of their Lands, Tithes, Coal-pits, &c. which without Insestment are but of the Nature of Assignations, producing personal Action against the Granter and his Heirs, and inessectual against singular Successors. And a Decreet conform, obtain'd against the Granter's Tenants and Chamberlains, is effectual against his subsequent Tenants and Chamberlains; but not against the Tenants and Chamberlains of his Heir, without a new Decreet of Transferrence.

SECT. V.

Of Infeftments of Relief, or for Security of Sums:

INFEFTMENTS for Relief, or for Security of Sums, are real Burdens, whereby Apprisings or Adjudications led for the Money so secured, will be preferred according to the Dates of the Insestments, but are no Title of Possession. And any Disposition or other Right, for Relief or Security of Debts to be contracted, is of no Force, as to Debts contracted after the Scisin taken on the said Disposition or Right, but only as to Debts contracted before (a).

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(a) Act 5. Seff. 6. Par. K. W.

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SECT. VI. of Tacks.

of any Thing is set or let for Hire, or a reserv'd Rent, call'd the Tack-Duty, from and to a determin'd Time. 'Tis also term'd an Assedation. The Granter of the Tack is called the Setter, and the Receiver is call'd the Tenant, or Tacksman. A Tack is either tacit, or express.

2. A tacit Tack is inferr'd from a Tacksman's possessing peaceably after his Tack is expired. For fo long as he doth fo posses, both the Setter and he are presum'd to continue the Tack of Consent upon the former Terms; which is called tacit Relocation, or Renewal of the Tacit Relocation upon a Tack set by a Beneficiary, is sustain'd for more Years than the benefic'd Person could set. And a Liferenter's Tenant is liable only for his former Tack-Duty, for Years he quietly possess'd after the Liferenter's Death: Albeit he the Liferenter could not set for these Years. Tacit Relocation in Lands, is taken off by a Warning to remove; and tacit Relocation ceases in Tithes, if Parsonage, by Inhibition; and if Vicarage, by Citation, or Inhibition.

3. Express Tacks are either verbal, or writ-

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[1.] A verbal Tack is good only for a Year, and if granted for more Years, the Setter, or Tacks-

Tacksman may resile, and render the Set inesfectual; as to these more. But in Case of either Parties departing from such a Tack, except as to one Year, the Penalty agreed to be paid by the Failer to the Observer may be claim'd.

[2.] Written Tacks are either those properly

so called, or Rentals.

Ordinary written Tacks are granted either for Life, or for a certain Number of Years, by the Heretor, or Person having Right to the Subject set, which are called principal Tacks, in Contradistinction to Tacks set by Tacksmen, called Sub-tacks. Tacks set by Wadsetters to

the Reversers, are term'd Back-tacks.

4. All Tacks must express the Terms of Entry, or when they should begin, and of Ish, i.e. when they should end, and the Tack-Duty, otherwise they are null. Tacks set to a determin'd Time; and that being elaps'd, during the not Payment of a Sum, or not Performance of a Deed, are effectual only during the definite Time express'd. Where a Tack expresseth no Time of Entry, the Entry is understood to be at the Date, or the next Term. Back-tacks in Wadsets, without any other definite Ish, than during the not Redemption, are good.

5. Persons may set Tacks of what they have Right to, and a Power of Administration. Tutors, Curators, and Factors, cannot set Tacks for longer Time than their Office continues. But Church-Men, tho upon the MatCh. 4.

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Law of Scotland. Tit. 4. 6.

ter naked Administrators, were allowed to set Tacks of their Benefices, under certain Regulations: As Prelates, with Consent of their Chapter, for 19 Years; and the inferior Clergy, with Consent of the Patron, for their Lifetime, and five Years thereafter (a), or without such

Consent, for three Years (b).

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6. The Setter of a Tack has Action, not only against the Tenant, but also against the Sub-tenant, for Payment of his Rent. And tho' the Sub-tenants Tack-Duty be less than the principal Tenants, the Heretor may pursue him as Possessor for the Whole; leaving him to tecur for Warrandice against the principal Tacksman.

A Setter of Lands in the Country hath a tacit Hypotheck, or legal Pledge for the immediate last Years Rent, on the Fruits and Growth of the Ground; and these not satisfying, on the Goods upon the Ground, the Time when that Years Rent fell due, and will be preferr'd for the same Actione Hypothecaria, either to a personal Creditor of the Tenant, who hath affected them by Diligence, or to a Stranger, who bought them.

Heretors of rented Houses have also a tacit Hypotheck for a Year's Rent upon invecta et illata, all the Tenant's Moveables in these Houses, or other Mens Goods found there af-

ter the Term of Payment.

⁽a) Act 4. Par. 22. junct. Act 15. Par. 23. J. VI. (b) Act 200. Par. 14. J. VI.

7. A Tack is a sufficient Title for Mails and Duties; and if fet by the Proprietor, affordsa possessory Judgment; and tho' fet by a Liferenter, defends the Tacksman from being turn'd out of Possession by the Fiar, till he be orderly warn'd, or from paying more than the Liferenter's Tack-Duty. A Tack, cloth'd with Poffession, is real and effectual against singular Succeffors, fo as the Tacksman cannot be remov'd before the Ish of his Tack, whether of Lands (a), Tithes, or Houses, or any other Thing affording Rent or Profit. A Tack for Years extends further than is express'd. So that such a Tenant cannot assign his Tack, nor grant a Sub-tack, unless his Tack bear a Power so to But a Liferent Tack may be affign'd, tho' it mention not Assignys.

8. In Order to force a Tenant to remove, when his Tack is expired, or when he hath no longer Title to posses, he, if Tenant of Land in the Country, must be warn'd so to do, whether within, or out of Scotland, upon 40 Days before Whitsunday, that is, the 15th Day of May (b), within the Year, tho' the Title of his Possession cease at another Term. Which Warning must be intimated to him, and on the Ground of the Lands, and at the Parish Church Door, immediately after the Forenoon's Sermon, while the Congregation is dissolving, or when it useth to be dissolved, in Case there be no Preaching, and Copies thereof left in both

(4) Act 17. Par. 6. J. II. (b) Act 30. Seff. 2. Par. W. & M.

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Ch. 4. Law of Scotland. Tit. 4. \$ 6. 157

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both these these Places (a). Tenants of Houses within Burgh are warn'd according to the Custom of the Burgh, by a Town Officer, who, in Evidence thereof, chalketh their Doors 40 Days before the Term at which they should remove.

The Tenant being duly warn'd, may be purfued, even before the Term, to remove at the Term, upon a Citation of fix Days, if within Scotland, and 60 Days, if forth thereof. In which Process he will not be allowed to propone any Defence, requiring a Term to prove it, till he find Caution for the violent Profits, in case he succumb; that is, the double of the Rent of a Tenement within Burgh, and the greatest Profits the Pursuer could have made of Lands in the Country. If the Warning was orderly, and the Tenant had no colourable Title to maintain his Possession longer; the Lords decern him to remove, and to pay the Pursuer violent Profits of the Land from the Warning, till he give Obedience. But otherwife, where the Defender had a probable Ground to keep Possession, he is decerned to remove only, without being liable to violent Profits.

9. If, after warning, any Person come in Posfession, by Consent of the Party warned, or thro' his Default, in not offering the void Possession to the Warner, such an Invader is called Successor in the Vice, and is liable to a summary Process of Removing: And violent Profits, af-

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ter Decreet of Removing, are obtain'd against the Tenant Warn'd.

tacitly oblig'd, to leave the Ground in the same Condition as at their Entry, and the Houses as good as they found them, without getting any Allowance of Expences, in repairing and upholding the Houses, unless it be so expresly provided in the Tack. But the Expence of repairing and upholding Houses within Burgh, lies upon the Proprietor, and not upon the Tenant.

the Tenants not offering to pay the Tack-Duty for the Space of two Years; or for not finding Caution, when cited to do it, for a Year's Tack-Duty resting, and in Time coming. 2. By the Tenant's Renunciation, either express in Writ, under Form of Instrument; or tacit, implied from taking a posterior Tack of sewer Years, or paying a greater Tack-Duty.

12. A Rental is a Kind of Tack or Set for paying a Grassum, or some Acknowledgement at the Entry, and an easie yearly Duty thereafter, set down in the Master's Rental Book. One who enjoys a Rental, is call'd a Rentaller, and hath the Privilege of a kindly Tenant, either by the Master's Indulgence, or, because his Predecessors have been ancient Possessors, or kindly Tenants.

No Set is accounted a Rental, except it be in Writ, and the Writ bear the same to be a Rental. Ch. 5.

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The Heretor of the Ground only can set Rentals: But Tutors may renew them for the accustomed Grassums.

A Rentaller cannot, without express Power given him, introduce Sub-tenants, or assign the Rental. And by so doing, he loses his Rental, if the whole, or most of the Land therein be Assigned; and by a partial Assignation of less than the Half, the Rental falls as to the Part assigned.

A Rental is not, as a Tack, null for not mentioning an Ish: For when set to an indefinite Time, it lasts for the Receiver's Lisetime. A Rental conceiv'd in Favour of a Man and his

Heirs, extends only to the first Heir.

Having explain'd the private Burdens upon real Rights; I proceed to touch briefly the publick Burdens they are subjected to.

CHAP. V.

Of publick Burdens, to which real Rights are liable.

Publick Burdens are those Taxations imposed by the Parliament, or a Convention of Estates, to answer the publick Exigences for supporting the Government, and Security of the Nation: Which Subjects are bound in Duty to contribute to, by opening their Purses, as Occasion requires.

Anciently, in Order to raise Taxations more equally off particular Lands, there was a gene-

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ter Decreet of Removing, are obtain'd against the Tenant Warn'd.

10. Tenants of Lands in the Country are tacitly oblig'd, to leave the Ground in the fame Condition as at their Entry, and the Houses as good as they found them, without getting any Allowance of Expences, in repairing and upholding the Houses, unless it be so expresty provided in the Tack. But the Expence of repairing and upholding Houses within Burgh, lies upon the Proprietor, and not upon the Tenant.

11. A Tack may be declared void. 1. For the Tenants not offering to pay the Tack-Duty for the Space of two Years; or for not finding Caution, when cited to do it, for a Year's Tack-Duty resting, and in Time coming. 2. By the Tenant's Renunciation, either express in Writ, under Form of Instrument; or tacit, implied from taking a posterior Tack of fewer Years, or paying a greater Tack-Duty.

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Anciently, in Order to raise Taxations more equally off particular Lands, there was a gene-

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ral Valuation made of all the temporal Lands in Scotland, when the Scots were at Peace with England, called the Extent or Retour. Long thereafter, another higher Valuation was made. while these Nations were at War. Whereupon the former came to be term'd the old Retour, or old Extent, or the Valuation tempore Pacis; and the latter, the new Retour, or Extent, or the Valuation nunc, et tempore Belli. Taxations were, at first, rais'd conform to the tax'd Roll of the old Retour, or Extent; and thereafter, according to that of the new Retour, or Extent; and Church-men were tax'd conform to Bagimont's Roll. But in the Year 1666, a new Valuation of the whole Land Rent of Scotland, as then possels'd, was made: According to which all Subfidies are now raifed by Way of Cefs, imposed by a voluntar Offer made by the Subjects to the Sovereign, and declared in the particular Acts imposing them, to be debitarfundi, upon all Lands not exempted from Payment. They bear Annualrent after fix Months from their falling due (a). Irredeemable Annualrents by Infeftment, not relative to a Stock, and Liferent Infeftments of Annualrent are liable to publick Burdens, proportionably with the Lands affected therewith.

Thus far of real and heretable Rights: Obligations, and personal Rights come next under our View.

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BOOK III.

Of Obligations, and personal Rights, their Nature, the several Kinds of them, how acquired, and annulled.

binding one to pay or perform any Thing to another: It confishs of two Parts, viz. The Interest of the Creditor therein to exact what is due, whence it is called a personal Right; and the Burden upon the Debtor, whence it is term'd an Obligation.

2. Obligations are either natural, or civil.

3. Natural Obligations are those, which arise from mere natural Equity. Whereof some produce Action with us, as the Obligations of Parents to aliment their Children, and Husbands to entertain their Wives, &c. Others are without any civil Effect, or coercive, and are lest to the Conscience of the Parties, as the Obligations to Gratitude, Charity and Mercy, &c.

4. Civil

4. Civil Obligations are those, which owe their Birth and Authority to positive Law, or municipal Custom, and afford Action for Performance thereof. These are either Principal, or Accessory.

CHAP. I. Of Principal Obligations.

PRINCIPAL Obligations are variously divided. 1. They are either pure and simple, or conditional, or to a Day.

2. They are onerous and lucrative, or gratuitous. 3. They spring either from Contracts, or quasi Contracts, or from Crimes and Offences.

TIT. I.

Of Obligations pure, conditional, and to a Day.

r. A Pure or simple Obligation is that, which hath present Estect, and the Granter stands bound from the Date to pay or

perform.

2. A conditional Obligation is that, which is of no Efficacy, till fomething is performed, or happen, which may, or may not be. The Condition must, 1. Be possible, that is, such as may naturally happen, or is in the Creditor's Power: For, an impossible Condition voids the Obligation it is adjected to. A Condition is impossible either de Facto, which naturally cannot come to pass, or de Jure, which is contrary

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trary to Law or good Manners. 2. A Condition must be uncertain, and relate to the Time to come. For, if it be certain, by relating only to the present or past Time, the unknown to the Parties, the Obligation granted under such Condition, is either effectual, or null from the Date, according as the Condition hath happened, or not. Sometimes a Condition is implied, the not expressed: As an Obligation to pay a Tocher, implies this Condition, if the Marriage be persected.

3. An Obligation to a Day is that, which is presently binding, but, whereof Performance cannot be sought for a certain Time. After elapsing whereof, dies interpellat pro Homine, the Debtor is in Mora, without Necessity up-

on the Creditor to require Payment.

4. A conditional Obligation differs from an Obligation to a certain Day; in that the former is annulled, by the Creditor's dying before the Condition exist; whereas, the latter, upon the Creditor's dying before the Day, passeth to his Representatives.

TIT. II.

Of Obligations onerous and lucrative.

A Nonerous Obligation is that, which is made for a valuable Caufe or Confideration.

2. A Incrative Obligation is that, which is made for mere Love and Favour, to the Re-

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ceiver, or, for which nothing is done or paid, called a Donation or Gift.

3. A Donation is petfected, by Consent of the Donor or Giver, and the Acceptance of the Donee or Donatary, to whom the Gift is made.

4. Donations are either Proper, or Improper.

5. A Proper Donation is the bestowing fomething upon another, without any other Motive, than that the Donor may exerce an Act of Liberality. Which is so little favoured in Law, that none are prefumed to gift. Far less is a Debtor presumed to do so: So that any posterior Obligement granted by him in Favour of his Creditor, without an onerous Cause, is interpreted to be in Security or Satisfaction of the former pro tanto. But, this Presumption of Law may be taken off by stronger Arguments, inferring a Design rather to gift, than pay. Thus, Provisions, by Parents to Children in Familia, are not ascribed in Satisfaction of anterior Bonds of Provision granted to them, if the latter were not made in the Childrens Contracts of Marriage. A Father alimenting his Children, is presumed to do so ex pietate, without any Defign to oblige them. Aliment furnished to any Person of Discretion after Pupillarity, without any Agreement to pay for it, is presumed to be given gratis; if the Furnisher was not in Use to get Money for so doing. A Debtor granting to his Creditor a Bond, bearing expresly the Motive

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above the Sum formerly due, is not understood thereby to compensate the former Debr.

6. Improper Donations are remuneratory Gifts, made in Recompence of Services, and

Donations in Prospect of Death.

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A Donation made in Prospect of Death is of the Nature of a Legacy, and voided by the Donor's surviving the Donee or Donatary.

TIT. III.

Of Obligations arifing from Contracts, and the seweral Kinds of them.

1. A Contract is an Engagement betwixt two or more Persons, effectual to force

Performance by an Action.

2. In all Contracts, some Things are essentially required, as, 1. That the Parties be capable of contracting. Some are simply incapable, as those, who want the free Use of their Reason, married Women, &c. Others cannot contract to their Prejudice, as Persons under Age, &c. 2. Parties must consent, which Consent may be either express, by Word or Writ; or tacit, by Deeds importing Consent. Consent tacitly inferr'd from Fact or Deed, is called Homologation. But Homologation cannot take Place, where it is not proved or presumed, that the Homologator knew the Right to which his Deed is alledged to import a Consent and Nor, where his Deed may be ascribed to another

ther Cause. Nor yet is Homologation inferred from a necessary involuntary Act, to which the Party might have been compelled by Law. Consent must be given with Knowledge of what is necessary to be known, in order to form the Engagement, and with Freedom (a). 3. The Subject Matter of the Contract must be, a Thing in Commerce, and in Man's Power, and such as Law allows of. Thus pactum de quota litis, whereby Advocates agree to have a Share of the suture Profit of a depending Plea, is null. But a Contract is not quarrellable, upon the Account of enorm Lesion or Prejudice sustained by either Party.

3. Contracts may be variously divided. 1mo, Some are obligatory upon one Side, or upon one of the Parties only; others are reciprocal and obligatory upon both. In reciprocal Contracts, where the mutual Obligements are either conceived conditionally, viz. That the one Part being performed, the other should be performed also, or, are Causes of each other; neither Party can demand Implement from the other, till he himself perform. 2. Contracts are, 1. Real, or those perfected, by the Intervention of Things given or done. 2. Verbal. 3. Written Contracts. 4. Those perfected by sole Consent. 5. A Contract perfect, partly by Writ, partly by Consent.

TIT.

(a) Vid. Part. I. B. II. Ch. 2. Tit. 1. Sect. 1, and 21

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TIT. IV.

Of real Contracts, or those perfected by the Intervention of Things,

THese are, 1. The Loan of Money, and other Things to be restored in Kind. 2. The Loan of Things to be restored in Spe-3. Depositum. 4. Exchange or Excambion. 5. Policy of Infurance.

SECT. I.

Of the Loan of Money, and other Things to be restored in Kind.

1. THE Loan of Things to be restored in Kind, is a Contract, whereby a certain Quantity of Fungibles, or Things that pass in Commerce by Number, Weight or Meafure, fuch as Money, Corn, Wine, or the like, is given by one to another; on Condition, that he shall restore the Equivalent in Quantity and Quality, at the agreed Time,

2. The Borrower of Corn, Wine, and the like, owes the same Quantity and Quality borrowed, and neither more nor less, whether the Price be risen or fallen. But in the Loan of Money, the Debt is to be paid, according to the Course of Money, or the extrinsick Value set upon it by lawful Authority, at the Time of Payment, v. g. 100 Crowns borrowed, may be repaid in fewer, if that Species of

Money

Money was cried up, and heighten'd in Value before the Payment; and more should be repaid, in case of the Value's being lower'd.

3. The ordinary Way of borrowing Money among Merchants is, by an Exchange Contract contained in Bills. Whereof some are conditional, making the Sum therein payable, only upon some Condition, as Bills of Bottomry; others are pure and simple, which are absolutely to be paid at a precise Time, as Bills of Exchange.

SECT. II.

Of the Loan of Things to be restored in Specie, or in the Same Substance.

i. A Loan of Things to be restored in Specie, is a Contract, by which one gives a Thing to another for a special Use, on Condition, that after he hath used it so long, as his Occasions required, the same individual Thing be returned in as good Condition as it was, when lent.

2. He who borrows a Thing for his own Use, as a Horse to make a Journey for his own Business, is obliged to take Care of it, with all the Exactness that is usually observed by the most diligent Persons, and is to answer for all the Loss and Damage happening for Want of such a due Care. When a Thing is borrowed for the mere Behoof of the Lender, as a Horse to go into the Country about his Assairs; the Borrower is liable only for what may

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may happen thro' his Fraud, or any gross Fault that is next Door to it. If the Loan be given for the common Advantage of both Borrower and Lender, as a Horse to the Lender's Copartner, to go and look after the common Concerns of the Company; the Borrower must answer for what falls out thro' his Want of that Care, which a discreet and diligent Man takes in his own Concerns. But, if it has been agreed what Care the Borrower should take of the Thing lent, such Agreement is the Rule of his Diligence.

3. Seeing the Lender remains Proprietor of the Thing which he lends, if the Borrower has used it only during the Time, and for the Purpose to which it was lent him, and it perish, or is diminished, without his Fault, by Accident, or by the bare Essect of the Use, which he had Right to put it to; the Owner bears the Loss: Unless the Borrower took

upon himfelf all Accidents.

4. The Borrower is obliged to restore the Thing back, after it has served the Use for which it was lent, without any Claim from the Lender, of Expences necessary in order to make Use of it; but only of extraordinary Charges bestowed upon it.

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SECT. III.

Of Depositum,

A Depositum in general is, the committing of any Thing to the Custody of another in Trust. Which may be divided into Depositum properly so called, and Sequestration.

I

Of Depositum, properly so called.

1. A Depositum properly so called is, a Contract by which one Person gives to another Something to keep without Reward, on Condition, that he restore it, whenever demanded by him, who deposited the same. He who deposites, is term'd the Depositor, and the other

the Depositary.

2. If the Depositary suffer the Thing deposited to be lost, to perish or be spoiled thro his Fraud, or gross Fault, or inexcuseable Negligence, or by not taking the same Care of it that he does for his own Concerns; he is bound to make it good: But, if such Loss or Damage happen by Accident, or thro some small Neglect, or Want of that Care, which another prudent Man probably would have used; the Depositary is not accountable for it.

3. The Thing deposited must be restored, when the Depositor thinks sit to call for it, with the Produce, i. e. the Fruits and Profits:

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And the Depolitary recovers any necessary and profitable Charges laid out by him in keeping it; but cannot derain it with him, in Compenfation of other extrinsick Debt owing to him.

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4. That a Writ out of the Hand of the Granter, was deposited upon Terms, can be proved only by the Writ or Oath of the Perfon, in whose Favour it is conceived, and not by the Depositarie's Oath: But the Terms of Depositing may be proved by his Oath.

Of Sequestration.

1. Sequestration is, the depositing of 2 Thing, whereof the Property or Possession is disputed, by two or more pretending to it, in the Hands of a Third Person, to keep, till the Controversy be decided, and to restore it to him, who shall be acknowledged or declared the true Owner.

2. Sequestration is either voluntary, which is made by the Agreement of Parties; or necessary, which is directed by Authority of a Judge, and is therefore, called a judicial Se-

queitration.

3. Judicial Sequestration with us is, a committing the Cultody and Management of a Thing controverted in Judgment among several Pretenders, to some indifferent Person, by an Act and Commission of the Lords of Seffion. fion, to be made forthcoming to such, as shall be found to have best Right. This Trustee is appointed, at the Desire of Parties interested, by the Lords, upon several Occasions: As for managing an overburdened Estate, pending the Ranking of the Creditors Interests, or, for managing Hareditatem jacentem, during the Time that the apparent Heir deliberates, or is perhaps Abroad, and ignorant of his Interest, called Curator bonis; a Factor on the Estate, for keeping controverted Moveables, as Jewels, Plate, Heirship, &c. Sometimes Curator bonis is named by the King's Gift.

4. Factors appointed by the Court of Seffion, for managing sequestred Estates, must not be Writers or Dependers on the Session. They find Caution for their Diligence and Fidelity; are allowed Salaries, besides their Expences; must, within six Months of extracting their Factories, give into the Lords a Rental of the Estate, and bygone Rests, and yearly give in Schemes of their Accompts; are liable for Annualrent of what Rents they recover, or might have recovered, within a Year after the same are due; cannot, during their Office, become Creditors upon the sequestred Estates, except by Succession, and are exauctorated by the Lords.

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SECT. IV.

Of Exchange or Excambion.

EXCHANGE is a Contract, by which any one Thing, except Money, is agreed to be given for another. If either of the Things bartered, appear before Delivery to belong to some Third Person, the other Party may refuse to accept of it, and retain what he was to give in Exchange for it. If it be evicted by the Owner after Delivery, the Contract becomes void, and the Party from whom it was evicted, hath Recourse to what he gave in Exchange: Which he may recover from singular Successors for an onerous Cause.

SECT. V.

Of the Policy of Insurance.

THE Policy of Insurance is a Contract, whereby one, for a Pramium or Price stipulated, takes upon him the Peril of Ships, Goods, or any other Thing subject to Hazard.

TIT. V.

Of verbal Contracts:

I. V Erbal Contracts are those, made by the Interposition of Words. Which are either Promises, verbal Offers, or Pactions.

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doth verbally engage himself to pay, or do something to another, without mutual Agreement. Which is binding before the Person, to whom it is made, accept thereof. But some Promises may, even after such Acceptance, be resiled from: As a Promise of Marriage may be past from, before Copulation follow upon it; and a Promise to grant any Right that requires by the Nature thereof, or is agreed by the Parties, to be perfected in Writ, may be resiled from, till the Writ be sign'd, and delivered.

3. A verbal Offer to give of perform Something to another, is not of Force, till it be accepted by him; For, till then, the Offerer may revoke it; and it falls by his Death.

4. A Paction is a verbal Agreement be-

twixt two or more to do, or not to do.

5. Gratuitous Promises, tho of a Sum never so small, cannot be proved by Witnesses, but only by Oath of Party. But a Promise incident to a Bargain concerning Moveables, and Merchant Bargains made in Markets, may be proved by Witnesses.

TIT. VI.

A LL probative Writs with us, are either publick, as Instruments of Notaries; or private Writs, under the Hands of private Persons;

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Persons, or Corporations, as Contracts, Bonds, Bills, Tickets, Dispositions.

2. Some Obligations require Writ to make them binding, others require it only for Proof.

3. Obligations requiring to be perfected by Writ, are either those that require it as an essential Solemnity, viz. Dispositions of Heritage, Tacks for longer Time than a Year, Rentals, Assignations, and all Matters of Importance that is, exceeding in Value 100 lib. Scots; or, a Sum never so small that is to be annually paid, which may be past from by either Party, till the Writ be sign'd; or, such as are agreed to be reduced in Writ, tho' they may be made without it, which may be resiled from, before the Writ be perfected.

4. Many of our Writs must be on stamp'd Paper or Parchment, otherwise are inessectual, unless the Stamp-duty be paid, and Five Pound Sterling to the Crown, to supply the Desect (a).

5. Contracts, Dispositions, or other Securities may be written, either on Sheets battered together, and the Margins at the joining of the Sheets signed by the Parties; or by Way of Book, in Leaves of Paper, whereof every Page is marked by the Number, and signed by the Parties, and the End of the last Page, (which the Witnesses need only to sign in Writs, requiring Witnesses) mention how many Pages it consists of (b).

6. All

(b) Act 15. Seff. 6. Par. K. W.

^{(4) 10.} A. C. 19. junet. 12. A. Seff. 2. C. 9.

be signed by the Granters, if they can write, or by Notaries for them, if they cannot. The King superscribes his Deeds, and his Secretary of State subscribes the same. Subjects do only subscribe. Noblemen and Bishops, are allowed to subscribe by their Titles, and all other Persons by their Names and Surnames (a), either at length, or by the two initial Letters thereof.

7. Contracts or other Deeds of Importance do commonly require more Solemnity, than others of less Confequence. For no Writ of Importance is fustained, except it be not only figned before two defigned Witnesses, if the Party can write; or, by two Notaries in Presence of four designed Witnesses, if the Party cannot write (b); but also subscribed by the Witnesses (c), and specially name and design the Writer (d). Where a Party cannot write, he must give Warrant to two Notaries to subscribe for him, by touching the Notaries Pen. Witnesses in written Contracts, called Instrumentary Witnesses, should be designed (i. e. their Additions, by which they may be distinguished from others marked) in the Body of the Writ, and ought not to subscribe as Witness, unless they know the Parties, and faw them fign, or faw or heard them give Warrant

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⁽a) Act 21. Par. 2. Seff. 3. Ch. II. (b) Act 80. Par. 6. 7. VI. (c) Act 5: Par. 3. Ch. II. (d) Act 175. Par. 13. J. VI.

rant to a Notary or Notaries, to subscribe for them; and in Evidence thereof, touch the Notary's Pen, or heard them acknowledge their Subscriptions at the Time, under the Pain of Accession to Forgery (a). If there be Marginal Notes, or Additions upon the Paper, these must all be sign'd by the Party, and the Writ should bear, that the Witnesses are also Witnesses to the Marginal Note or Notes, whereof the Number, if more than one, should be

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8. But any Writ for a Sum, not exceeding 100 lib. (if it be not to be annually paid) needs' not Witnesses; and, where the Granter cannot write, one Notary and two Witnesses may subscribe for him. Nay, even some Writs of Importance are fustain'd, tho wanting Witnesses. As, 1. Contracts of Marriage. 2. A. Tripartite Contract. 3. Holograph Writs, that is, all written with the Granter's Hand, are good without Witnesses, but do not prove their Dates. 4. Bills of Exchange, and Letters of Credit. But Promissory Notes are not privileged in Scotland. 5. Notes, or Orders for Military Discipline, or circulating the Pay of a Regiment. 6. A Testament, tho' of great Importance, fign'd by one Notary, or a Minister of the Gospel, who may act as a Notary in Testaments for one, who cannot write, in Presence of two subscribing Witnesses, is good. \mathbf{M} 9. Date

(a) Act 5. Par. 3. ch. II.

9. Date and Place are not necessary Essentials in a Writ, unless the Verity of it be questioned.

10. Writs, not excepting Bills of Exchange, wherein the Names of the Persons in whole Favour conceived, are left blank, and not inferted before, or at subscribing, or, at least, in Presence of the Witnesses to the subscribing, before Delivery, are null. But Indorfations of Bills of Exchange, or the Notes of any trad-

ing Company are excepted (a).

11. An Obligation in Writ is regularly not binding, till it be delivered to the Creditor: But some Writs are effectual without Delivery: As mutual Contracts, Writs bearing a Clause dispensing with the Delivery, or referving a Liferent or Faculty to the Granter to alter, Bonds granted by Paients to their Children.

12. Publick Writs, as the Instruments of Notaries, Acts of Office written by common Clerks, are null, for wanting the Writer's Name and Defignation. And feeing Incorporations and publick Offices are allowed to print their Bonds, with Blanks for the Substantials, to be filled up as Occasion offers; fuch printed Bonds are good, if the Filler up of these Blanks, viz. the Debtor's Name and Defignation, Sum, Date and Witnesses be named and defigned: Otherwise they are null.

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(a) Act 25. Seff. 6. Par. K. W.

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ture, is modus habilis, to convey any Right or Estate belonging to the Granter in Scotland, will, if solemn, according to the Law of the Place, where it is made, be sustained here. But a foreign Deed, which, by the Nature of it, is not habile to convey such Interest belonging to the Granter in Scotland, tho effectual by the Law of the Place, where it is made, would not be sustained here.

TIT. VII.

Of Contracts perfected by Sole Consent.

These are Selling and Buying, Letting out and Hiring, Partnership, and Mandate or Commission.

SECT. I.

Of Selling and Buying.

t. SELLING and Buying is a Contract; by which one gives a Thing for a Price in current Money.

2. A Sale is, either private, betwirt the Buyer and Seller; or publick and open, by Auction or Roup.

A Sale, by Way of Auction or Roup, is, when publick Intimation is made of a Day when, and the Terms upon which, the Goods are to be exposed to Sale. Which is either vo-

luntary, at the Pleasure of the Owner, or necessary, by a Decree of a Court of Justice.

3. All Things that ly in Commerce, either actually existing, or the uncertain Expectation of what may be; as a Draught of Fishes before the Net is thrown, may be fold. Yea. the Sale of a Thing belonging to a Third Perfon subsists, to make the Seller liable for Damages to the Buyer, in case it be evicted by the true Owner. But there are some Things, which, tho' not altogether exempted from Commerce, the Owner cannot warrantably fell to fome Persons; as, contraband Goods to Enemies. Other Things some Persons are discharged to buy, tho' others are not: As, Members of the College of Justice are prohibited to buy depending Pleas, upon Pain of losing their Places, and all the Privileges thereof (a). Things again, which are the proper Subject of Commerce, are restrain'd, as to the Manner of Buying, by the Laws against Forestalling, Regrating, and Ingrossing, or, as to the Manner of Selling, by the Law against Monopolies.

4. The Seller is obliged to declare to the Buyer any latent or secret Insufficiency or Defect of the Thing sold, which renders it so unfit for the Use for which it was bought, that if it had been known to the Buyer, he would not have bought it: Otherwise, there is Place for Redhibition; that is, the Seller is obliged

(a) Act 216. Par. 14. 9. VI.

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5. The Price must be certain, or such as may be ascertained by the Determination of one, to whom it is referred. It may be referred either to a Third Party, or to the Seller. In which Case, if the Third Party neither can, nor will determine the Price, or the Seller make it extravagantly high; the Lords of Sef-

fion will determine or modify.

6. When an individual Thing is bought, or a Parcel of Goods fold by Bulk, the Sale is perfect, at the same Time that the Parties are agreed about the Merchandise and Price thereof. But, if Goods of fuch a Number, Meafure or Weight are fold, the Sale is not perfect, till they be counted, measured or weighed: Because, till then, it cannot be known precifely what is fold. And, if it be agreed, that the Bargain should be put to writing, it is not persected, till the Writing be signed.

7. The Effect of a Sale, perfected in either of the Ways aforesaid, is, that the Seller is bound to deliver the Goods, and the Buyer to pay the Price, and the Bargain cannot be avoided, unless both consent. Again, the Buyer stands to all Loss happening to the Goods, while undelivered, without the Seller's Fault or Negligence, tho' the Property is not transferred to the former, till Delivery; and reaps the Profit of all Changes, which make them better. But, if they happen to be destroyed or diminished, M_3

diminished, after the Seller is in Fault for not

delivering them, he bears the Loss.

8. Some accidental Accessaries, not essential to this Contract, may be added to it. 1. Earnest (which we call Arles) is frequently given by the Buyer to the Seller, as a Symbol of the Bargain, which is a Piece of Money, or other Thing. The Effect of Earnest is sometimes regulated by Agreement: And where nothing is expressed about it, the Earnest, if it be a Species, ought to be returned after the Price is paid; if it be Money, it is reckoned as a 2. It is an usual Paction part of the Price. in Sales, that if the Price be not paid at the Time appointed, the Sale shall be void. 3. It is sometimes agreed, that the Seller shall be at Liberty to take back the Goods, he restoring the Price, which is called a Reversion, or Power of Redemption. 4. That the Seller and his Heirs shall have the Privilege to buy back again what is fold, before any other offering the like Price, which is called jus Retractus.

SECT. II.

Of Letting out and Hiring,

t. LETTING and Hiring is a Contract, by which one Party gives to the other the Enjoyment or Use of a Thing, or of his Labour, during a limited Time, for a certain Rent or Hire, Ch. I

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Hire, which may be either in Money, or any

other Fungible.

2. Not only Moveables, but also Immoveables, as Houses, Lands, &c. may be Let out for Hire: But the Letting of Lands is called a Tack, of which I have treated in another

place (a).

3. He who Lets a Thing, is bound to give the free Use and Enjoyment of it, to him to whom he Lets it out; to make the necessary Repairs, which the latter is not bound to make by Agreement; to maintain him in the free and undisturb'd Possession; and if evicted

from him, is liable for Damage.

4. He who takes a Thing to Hire, cannot put it to any other Use, than that for which it was given him, is accountable for any Damage happening to it, thro' his Fault, which any careful and diligent Man would not have fallen into; and after the Time, for which the Thing was Let, is expired, he who hired it ought to restore it to the Person who Let it to him, and to pay the agreed Rent or Hire. But the Hire is not due, if the Thing Let, by reason of some Defect therein, be not in a Condition to serve the Use for which it is Hired.

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SECT. III.

Of Partnership.

I. PARTNERSHIP is a Contract, by which two or more Persons join in common Money or Goods, and Labour or Service, for carrying on some lawful Commerce, Work, or other Business, that they may share among them all the Gain or Loss thence arising.

2. Money or Goods only, or Labour and Service only may be contributed by all the Partners; or Money and Goods by some, Labour and Service by others: Whereof the Contribution may be equal, or unequal. Where nothing is expresly agreed as to the Communication of Gain or Loss, all are to share therein, proportionably to their Contribution of Money, or Goods, or Pains. If the Shares of Profit and Lofs, that every one is to expect, be expressed, that must be observed; whether it be agreed, that those shall be equal, where the Contribution is unequal; or unequal, where the Contribution is equal. For it may be justly stipulated, that one shall have a greater Share of the Profit, than he shall bear of the Loss; and that another shall bear a greater Part of the Loss, than he shall have in the Profit; and that a third shall have a share of the Gain, and be altogether free from Loss. Because the Advantages which the Company may reap from the Credit, Interest, or KnowCh. I.

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ding of th doing Good and | Nam rant, ledge of one Partner, or from the Pains he takes, or Dangers he exposes himself to in the Management of the common Concern, may compensate the allowing to share in the Prosit, without Hazard or Loss. But such an Agreement, that the whole Loss should fall upon one of the Partners, and the whole Prosit go to the other, is unlawful, and inconsistent with a Partnership. If the Portions of the Gain only to accrue to the respective Partners, be expressed, those of the Loss will be regulated on the same Foot: And the mentioning only what Part of the Loss every one must bear, imports, that they shall share of the Gain in the same Proportion.

3. That is only understood to be Gain, in order to a Division among the Partners, which remains clear after all the Losses and necessary Expences are deducted: Loss is reckoned only

fo far, as it exceeds what is gain'd.

4. Partnerships are limited to the Commerce, or other peculiar Business thereof, and doth not extend to other Things which were to be

joined in common.

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nowledge ding to their Shares, for furthering the Affairs of the Community. One of more Partners, by doing in the common Concern, as buying Goods, borrowing Money, &c. doth oblige and profit the rest, if he act either in the Name of the Society, or by their express Warrant, or according as they have been accustom-

ed to act. But what he other Ways does, binds only himself. Each Partner has a Negative in what is necessary for the Design of the Society, unless it be otherwise provided, viz. That the Plurality should determine in all Matters. Partners are liable to fuch Diligence,

as Men use in their own Affairs.

6. Partnership is dissolved, 1. Not only by Confent of all the Partners, but any one may break it off when he pleases, either expresly, or tacitly, by trading separately, provided he do it fairly and feasonably, without any sinister 2. The Death of one of the Partners, dissolves the Partnership, with Regard to them all, unless it be otherwise agreed. 3. It is at an End, by the Accomplishment of the Business for which it was contracted.

SECT. IV.

Of Mandate or Commission.

1. A Mandate or Commission is a Contract, by which one gives Power to another accepting, to look after his lawful Concerns, Judicial, or Extrajudicial, as if he were present. The Giver of the Mandate, or Person authorizing, is call'd the Mandant, and the Undertaker to perform, the Mandatary or Proxy.

2. The Mandant is obliged to approve and ratify what is done, pursuant to the Power he has given; and to reimburse, indemnify, and fave harmless the Proxy, if there be Occasion Ch. I

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for it. It several Persons have named one Proxy, every one of them are bound to him in solidum, for the whole Consequences of the Commission.

3. The Mandatary, if he accept the Order and Power given him, is bound to execute it; and if he tail to do it, will be liable for the Damages occasioned by his not acting, unless he have a lawful Excuse for his Omission. He should take Care not to transgress the Limits of Authority given him; for, if he do, he himfelf only is obliged, and his Employer not bound to stand to it: Unless it is manifestly for his Advantage, or equivalent to that given in Commission. But a Mandatary buying a Thing dearer than he had Power to do, may oblige the Mandant to take it at the Price he allowed the former to give. When two or more Proxies are intrusted with, and undertake Direction of the same Affair, if they be named separately, as A. or B. or C. to manage it, any one may act effectually by himself; it named jointly, as A. B. and C. they must all exercise the Commission. Where a certain Number is appointed a Quorum, no fewer can do Business; and, if one or more be named fine quo, or fine quibus non, the Person or Perfons to named must act and confent. Each of several Mandataries or Proxies appointed for the same Affair, are answerable to the Mandant for the whole; unless their Commission regulate it otherwise. A Mandatary cannot subcommit his Authority, or authorize another

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ther Person to perform the Thing committed to him.

4. Mandates are, 1. Either general and indefinite, for managing all Affairs, or special,

for fome particular Affair or Affairs.

A general Mandate doth not impower to transact or alienate Immoveables, or to gift, or to serve one Heir to his Predecessor: And a Mandate bearing Authority, as to some special Things, with a General to do all other Assairs whatsoever, is not extended to any of greater

Importance, than those expressed.

A special Mandate is either express, declared by Word or Writ, or tacit. A tacit Mandate is that, which is inserr'd and collected from Circumstances of Fact: As from one's suffering a Person in his Presence to act in his Affairs without Contradiction; or from the giving or having Writs; from a Banker's setting a Person over his Office, or a Retailer's committing the Charge of his Shop to one, and allowing him to trade and do Business there for the Imployer.

2. Mandates are either undertaken gratuitoully, merely to serve the Authorizer, or for

a Reward, as Factories.

A gratuitous Mandate obligeth to no Diligence, but only to be honest. But Factors, who have Salaries, are liable to the exactest Diligence. A gratuitous Mandatary gets Allowance of his reasonable Charges and Expences in executing the Commission: But Factors, who Ch. 1.

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5. Mandates expire, 1. By the timely Revocation of him who gave it, or Renunciation of the Mandatary. 2. By the Death of either.

TIT. VIII.

Of a Contract perfected partly by Writ, partly by Consent.

AN Exchange Contract, is a Contract perfected, partly by Writ, partly by Consent, betwixt two Parties, either really, or representatively, whereof one draws, and gives to the other a Bill, which is a written Mandate to his Correspondent, to pay to the Creditor in the Bill, the Sum therein contained, at a certain Time, and sometimes in a particular Place, for such a Cause, implying sometimes, and at other Times not, an obligement for Repetition upon the Drawer, or some other in Favour of the Person, on whom the Bill is directed.

2. This Contract is perfected, partly by Writ, in so far as the Drawer of the Bill is obliged to make the Money effectual to the Creditor; partly by Consent, in so far as the Creditor tacitly ingages himself duly to negotiate the Bill.

3. He who pays the Value for a Bill, is called the Remitter, and the Person to whom the Bill

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Bill is payable, is called the Porteur, or the

Bearer, or the Possessor of the Bill.

4. Bills are payable, either at Sight, or so many Days Sight, or on a certain fixed Day, or so long after Date, or at such Usance. And such as bear simply an Order to pay, without specifying any Time, are to be paid at Sight.

of, either Value received, or make no Mention of Value, which implies Value received: And are shut up with these Words, as, Per Advice,

or, Without further Advice.

6. Bills are negotiated by voluntary, or ne-

cessary Acts.

[1.] A voluntary Act of negotiating a Bill, is the Indorsement thereof, which is a Mandate to pay the Contents to such a one, or his Order; to whom the Indorser becomes as liable as the Drawer. Indorsement (which commonly bears no Date) transfers the Right to a Bill, without Necessity of Intimation to the Debitor therein.

[2.] The necessary Act of negotiating Bills upon Days Sight, or Days after Date, is the Possessor's demanding immediately Acceptance of the Bill by him on whom it is directed; and in Case of Resusal, protesting for not Acceptance. Acceptance of a Bill is a sign'd Obligement to pay it: And the Person thus obliged, is called the Accepter. The Party upon whom any Bill is drawn, may accept either simply, or Super-protest in Honour of the Drawer, or Indoorses.

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dorfer, or with any Quality or Condition, as to accept to a longer Day, or for a less Sum, or if Provisions come betwixt and the Day. But the Possessor cannot safely receive a conditional, or qualified Acceptance, without Order from the Drawer, or last Indorser. Any third Perfon may accept a Bill Supra Protest, for Honour of the Drawer, or Indorfer, after it hath been protested for not Acceptance, against the Person drawn upon. Bills, if Acceptance be refused, ought instantly to be protested for not Acceptance, by taking Instruments thereupon, in the Hands-of a common Notary. The Accepter of a Bill has, beyond the Day in the Bill, three Days allowed him to make Payment, called Days of Grace or Favour, or Respite Days. Upon the last of these Days of Grace, the Creditor in the Bill ought to protest it against the Accepter, for not Payment. In all Cases, where Bills are protested for not Acceptance, or not Payment, Advice thereof must be sent by the next Post to the Drawer and Indorser. And if the Possessor of a Bill neglect in due Time, to prefent it, in Order to Acceptance, or to protest for not Acceptance, or not Payment, or to fend Advice of the Bill's being dishonoured and protelled; he loses his Recourse against the Drawer and Indorfer, if the Person drawn upon, or Accepter, do in the Interim prove insolvent. Which Steps of negotiating must be observed, both in Foreign and In-land Bills.

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7. A Bill of Exchange, whether Foreign (a) or In-land (b), is registrable within fix Months after the Date of the Bill, against the Drawer or Indorser, in Case of a Protest for not Acceptance, or after falling due thereof, against the Accepter, in Case of a Protest for not Payment: That Horning on a Charge of fix Days, and other fummary Executorials may pass thereon, for Payment of the Principal Sum and Exchange, if contain'd in the Bill, with Annualrent from the Date thereof, in Case of not Acceptance; and from the Time it falls due, in Case of Acceptance, and not Payment. But Exchange, if not contain'd in the Bill, with Re-exchange, Damage, Interest, and all Expences, must be purfued for in an ordinary Action; because they want to be rendred liquid and clear, by a Sentence of a Judge: Or, in Case of a Suspension of the Bill, may be eiked, or added to the Charge, and liquidated in the Decreet of Sufpension, finding the Letters orderly proceeded.

8. Receipts or Discharges of the Sum in a Bill from the Creditor, not being upon the Bill, but on Papers apart, will not defend the Payer against a new Possessor; nor is Compensation or Arrestment sustained against an Indosse, upon a Debt due by the Indosser to the Accepter, before the Indossation: Provided the Bill be granted, or indors d for Value given at the Time. But Bills, as well as other Obligation

(a) Act 20. Par. 3. ch. II. (b) Act 36. Seff. 6. Par.

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ons, are affectable by Compensation, or Arrestment, for the present Possessor's Debt, or by his separate Receipts, and liable to any other legal Exception sounded on his own Deed. Bills of Exchange drawn or indors'd by Bankrupts, in Satisfaction or Security of prior Debts, and not for present Value received, are allowed to be question'd upon the Act of Parliament 1696 (a), in the Person of the first Possessor, or Indorse; but not in the Person of a posterior Indorse, for present Value, who is not bound to know the Condition of the first Drawer, or Indorser.

TIT. IX.

Of Obligations arising from Quasi-Contracts.

A Quasi-Contract is, an improper Obligation on created by the presum'd Consent of two, or more Persons, arising from some Factor Affair, without any previous Agreement, or express Consent. Quasi-Contracts are many, according to the great Variety of humane Deeds and Business. Some whereof, as the Quasi-Contracts betwint Heirs and Executors, and the Creditors of the deceas'd; and betwint Minors and their Tutors and Curators, are handled elsewhere in their proper Places: I shall here take notice of these following.

to one for fomething to be done on his Part,

⁽a) Vier Act 5: Seff. 6. Par. K. W.

which he hath not performed, as Gifts, in Contemplation of Marriage, after the Treaty is broke off, &c. Which the Haver is obliged to restore; and if he refuse, may be recovered from him by an Action, call'd Condictio Causa data non lecuta.

2. Where any Thing is received for an unjust Cause, Law obliges the Receiver to restore it to the Giver, if he was innocent; and confiscates it, if guilty: Altho' the Receiver had perform'd the unlawful Engagement, for which

he got it.

3. He who receives Payment of what is not due to him, thro' the Payer's Mistake, lies under an Obligation to restore the Money as in-

debite Solutum.

4. Where one has Writs or Moveables in his Custody belonging to another, without any Title to detain them, he is bound to make Restitution to the Owner, in whose Favour there lies an Action against him, called Exhibition

and Delivery.

5. He whose Affairs are carried on prudently, tho' by some Accident unsuccessfully in his Absence, without his Knowledge, or Authority from him, is liable to the Manager for his necessary Expences: And the latter is answerable to the former, if he fail in the exacteft Diligence.

6. When, in Order to lighten a Ship at Sea, that is in Danger by a Storm, Part of the Cargo is thrown over Board, the Master of the Ch. 1.

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9. Ar the Mai Ship, and those whose Goods and Effects are thereby saved, are obliged to bear their Share of the Loss of that which was thrown over Board, for the common Safety, in Proportion to the Value, and not to the Burden or Weight of what is sav'd, which Contribution is call'd Average.

7. The inherent Obligation of mutual Relief, competent to several Persons liable in solidum for the same Debt or Deed, as Co-principals, is another improper Contract, whereby Payment, or Satisfaction made by one of more than his own Share, doth oblige all the rest pro rata, tho there be no express Clause of

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of the Ship, 8. Community of Goods is a Quast-Contract, by which two, or more Persons falling, without express Agreement, to have the same Things in common, are oblig'd to divide them at the Desire of one of the Parties concern'd, who, for that Essect, obtains a Brief of Division, directed forth of the Chancery to the Judge of the Jurisdiction, where the Lands, &c. in common lie. When the Division is made, the Writings and Rights, which are common to all the Copartners, are left in the Custody of him who hath the greatest Interest, and the test get Transumpts, or authentick Copies, and an Obligation from the Keeper to produce the Originals, when it is necessary.

9. Another Quafi-Contract is that, whereby

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are answerable to Passengers and Travellers, for exact Diligence in preserving the Goods and Baggage of Passengers or Travellers brought into their Ships, Inns, or Stables; and to make up any Loss or Damage therein: Albeit the Thing were neither known nor shewed to the Master of the Ship, Inn-keeper, or Hostler. In which Case, the Passenger, or Traveller, is allowed to prove his Loss by his Oath in litem, which the Lords will modify, if it seem extravagant.

obliged, by the Deeds of the Ship-Master, or Supercargo, whether Major or Minor, Man or Woman, and of those substituted by them, in what relates to the Commerce or Business, over which they are plac'd, and for all the Confequences, and necessary Expences thereof. If there be several Owners of the Ship, or Merchants, every one is liable for the whole of what is so done, or contracted by their Skipper, or Supercargo. The Creditor may also, if he think sit, pursue the Ship-Master, or Supercargo, upon his Contract.

Commerce, or Business at Land, are obliged by the Deeds of their Factors, and others, set over it, in what relates to such Commerce, or Business; but not by the Deeds of those substituted by their Factors, or other Overseers. Nor are Factors treating in the Name of their Masters personally liable, by the Engagements they

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The Power of Factors and Agents expires by the Master's Revocation thereof.

TIT. X.

Of Obligations arifing from Crimes and Offences.

CEeing by the Commission of Crimes and Offences, the Offender stands bound not only to publick Punishment, to which he may be brought by a Criminal Action; but also to repair the Loss and Damage of private Persons he hath injured, which he may be compelled to do by a civil Action: I shall, leaving the publick Satisfaction that is due by Offenders, to be treated in the second Volume, confider here the civil Obligations arifing from Crimes and Offences for Damages to the Parties injured, as the Obligation called Assythment, and those springing from Breach of Arrestment, Deforcement, Breach of Lawburrows, Ejection, Intrusion, Molestation, Force, Fraud, granting double Alienations, and Usury. As to the civil Obligation arising from Forgery, that is explain'd in its proper Place (a).

Damage done by Killing, Maiming, or laming one. Which for Slaughter produceth N 3 Action

⁽⁴⁾ Vid. Part IV. Ch. 2. Tit. 3. Sect. 2. Reduct. &

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Action to the Wife or Children, or nearest Kindred of the Person slain, and for Mutilation to the Party maim'd, for a pecuniary Compensation of the Injury.

Breach of Arrestment is, a delivery of Moveable Goods to the Owner, after they had been arrested in the Deliverer's Hand.

Deforcement is, a resisting and opposing Heraulds, Pursevants, and other Officers of Court, or Justice, in the Execution of their Office, and upon Account thereof.

Both which Offences are of the same Nature, and civilly redress'd the same Way: For the Party injured, has a civil summary Action before the Session, against the Offender, for Payment of the Debt and Expences, and of a Sum to be modified by the Lords for Damage and Interest (a).

4. For understanding Breach of Lawburrows, we must first explain what Lawburrows is. When any Person dreads bodily Harm, Injury or Oppression from another, he may obtain Letters of Lawburrows under the Signet, directed to Messengers at Arms, commanding them to take his Oath, that he dreads such Harm, and then to charge the Person of whom

(a) A& 118.Par. 7. J. VI. Vid. Part III. B. I. Ch. 2.

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he dreads it, to find Caution within fix Days, if on the South-side Tay, and 15 Days, if on the North-side : That the Complainer, his Wife, Bairns, Tenants and Servants shall be barmless and skaithless in their Bodies, Lands, Tacks, Possessions, Goods and Gear, and noways troubled or molested therein, by the Person complain'd upon, or others of his causing, Sending, Hounding, Receipting, Command, Assistance and Ratibabition, whom he may stop or let, directly, or indirectly, otherwise than by Order of Law and Justice (a): Under the pain of 2000 lib. for a Peer, 1000 lib. for a great Baron, 1000 Merks for a Free-holder, (or a Burgess having Land holden Burgage) 500 Merks for a Feuar (or one holding Feu of a Burgh), 200 Merks for an unlanded Gentleman, (or a Burge's without Land) and 100 Merks for a Teoman (b), which Penalties are determined according to the Quality of the Person charged to find Caution.

A Person charged with Lawburrows, sometimes summarly takes out an Act of Caution, under the Clerk of the Bills Hand, importing, that he hath sound Caution, conform to the Charge; sometimes he suspends the Charge. But if he neither suspend, nor find Caution, the Charger may proceed to Denunciation and Caption, and the Person charged will be liable to the Pains of Lawburrows, if he wilfully do harm to the Charger, his Wise, Bairns, &c. To which, his doing so, after Caution found,

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(4) Act 117. Par. 7. J. VI. (b) Act 166. Par. 13. J. VI,

Will subject him and his Cautioner in solidum. This is term'd a Breach or Contravention of Lawburrows, and is pursued by an Action of Contravention, rais'd with the Concourse of the King's Advocate, for His Majesty's Interest. The Pains of Lawburrows incurr'd by Contravention, are divided equally betwixt the King, whose Authority is contemn'd, and the

injured Party, (a).

Moveables, without Order of Law, or Consent of the Owner. Who has, within three Years after Commission of the Offence, an Action of Spuilzie, for Restitution of the Things taken away, with the violent Prosits, i. e. all possible Advantage that he might have made of them, to be estimated by his own Oath in Litem. Possession, without Necessity for the Pursuer to dispute his Right, which lies, not only against the principal Offender, but also against such as were accessory to it, who are all liable in solidum.

The ordinary Defences in this Action are, 1. That the Things were meddled with fairly, by a colourable Title, or were delivered to the Defender by the Pursuer. 2. That they were restored within 24 Hours, in as good Condition, as when taken. 3. That they were lawfully poinded, &c. Spuilzie is vitium reale, affecting the spuilzied Goods so, as they may

(4) Ad 77. Par. 6. Act 166. Par. 13. J. VI.

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be recovered from fair and honest Purchasers of them for onerous Causes.

A Spuilzie not pursued within three Years prescribes, as to the Benefit of violent Profits, and proving Damages by the injured Person's Oath (a). And there is Place to claim only simple Restitution, and ordinary Profits, in so far as the Intrometter was a Gainer, by an Action of wrongous Intromission.

- 6. Ejellion is the unlawful Entrance into Lands and Tenements, by violently dispossessing another or his Family, or Goods on the Ground.
- Shadow of Right, or Order of Law, to the Possession of Lands void for the Time, as to natural Possession, and civilly possessed by another.

Ejection and Intrusion differ, in that the former is attended with Violence, and cannot be justified by a Title to posses; and the latter is peaceable, and excused by the Intruder's having a Right for attaining Possession. But both Actions of Ejection and Intrusion agree with that of Spuilzie, in being sufficiently founded upon Possession, as their active Title, and privileged only, as to three Years, with the Claim to violent Profits, and the Oath in Litem (b).

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⁽⁴⁾ Act 81: Par. 6. 9. VI. (b) Ibid.

8. Molestation is the disturbing, molesting, and disquieting an Heretor of Lands, and his Tenants, or others claiming under him, in the free and peaceable Possession, and Enjoyment of some Part or Pertinent thereof, by the Proprietor, or Proprietors of adjacent Lands, their Tenants, Servants, or others in their Names, Tilling or Sowing it, or Pasturing their Cattle upon it, as if it were their own. For redreffing which Injury, the Party injured, if he defire only to maintain his Possession, without bringing his Property in Question, raises a Summons of Molestation before the Lords, against the Disturbers, &c. concluding they should defift and cease from troubling and molesting him, in the peaceable Possession of his Lands.

But, it he desire to have his Property of the said Parts and Pertinents also declared, he raises a Summons of Molestation containing a Declarator of Property, founded upon his, and

his Author's Right thereto.

In which Actions, the Lords grant Commission to the Judge of the Place, or to some other of their Number, to visit the Ground, and examine Witnesses there hine inde, as to Possession and Interruption. Whose Report being advised, the Commission is renewed to some, for settling the Boundaries of these Lands, confining upon one another, and riding Marches betwixt them, by setting Marchestones, or Land-Marks.

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Marches may be also tried and fix'd, betwixt neighbouring Heretors at Variance about the Boundaries of their Lands, by the Sheriff, or other inferior Judge, where the controverted Ground lies, upon a Brief of Perambulation issued forth of the Chancery to him for that Effect.

Marches of the Pertinents of Burgher Tenements, as Gardens, Court-Yards, &c. may be heard and determined upon a Brief of Lyning, directed to the Magistrates of the Burgh. But there is rarely Occasion for such a Brief; Differences about the Limits of Burgher Tenements, being commonly decided by the Dean of Guild.

9. Force is all unlawful Impressions, which move any one against his Will, for Fear of some great Evil, to give or do what he would not, if free from fuch Impression. Deed may be reduced upon that Head. But it is not every Ground of Fear that will be fustained, as a Reason of Reduction in this Case. For legal Force, as a Caption, or Imprisonment for civil Debt, or simple reverential Fear of offending a Parent, without any external Force or Threats used by him, is not allowed as a relevant Reason to reduce a Deed, in Favour of the Creditor or Parent. But it must be an unlawful Force, or just Fear of Danger to what is dear to one. Which is to be determined according to Circumstances, as the Quality of the Parties, whether the one was a weak weak Person, and the other of a violent Temper; the Place where the Deed was granted, whether in the Town, or in the Fields; the Time when, whether in Day Light, or under Cloud of Night, &c.

The Alledgance of Force and Fear is taken off; 1. By proving that the Deed quarrelled was a Transaction. 2. By a subsequent Ratification thereof, after the Cause of Fear is

over.

cheat another. For clearing whereof, I distinguish a Deed elicited by Fraud, from a fraudulent Deed: By the former, the Granter is deceived and imposed upon; by the latter, he deceives or desrauds his Creditors, or others.

[1.] Deeds elicited by Fraud may be annual, by Reduction excapite Doli, at the Inflance of the Party cozened, or his Heirs of Creditors, against the Deceiver or his Heirs, but not against singular Successors, innocent of the Fraud, acquiring honestly from the De-

ceiver.

[2.] A fraudulent Deed is, that of a Debtor to deceive his Creditors, and defeat or disappoint the Payment of what he owes to them: By granting to their Prejudice, Alienations, Dispositions, Assignations, Translations, Bonds, Discharges, or other Rights, or by omitting to acquire what he might have by Law; or, by acquiring in a Trustee's Name.

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All such Alienations, Dispositions, Assignations, and Translations made by Debtors, of their Lands, Tithes, Reversions, Actions, Debts, or Goods whatsoever, to any conjunct or consident Person, without true, just and necessary Causes, and a just Price really paid, may be declared null, at the Instance of their true Creditors, by Way of Action, Exception, or Reply (a).

By Debtors here, are understood Bankrupts, or Dyvours, or Persons actually insolvent, whose Estates are, by the Alienation, rendered insufficient to satisfy their Debts. For gratuitous Deeds, even in Favour of conjunct Persons, are sustained, where the Granter had, at the Time, enough beside to pay his Debts,

tho' he afterwards became insolvent.

Any Creditor, whether he be a gratuitous or onerous Creditor, whether he hath done Diligence or not, and whether the Term of Payment of his Debt be come or not, may quarrel such Deeds.

Real Rights ordinarily must be reduced, but Dispositions of Moveables, and Rights of small Moment, may be annull'd by Exception.

Not only Rights made to conjunct and confident Persons, without an onerous Cause, but even those granted to any Person, are reducible, at the Instance of the Granter's anterior Creditors: With this Difference, that the former must prove the onerous Cause of theirs, tho

the Right bear to be granted for onerous Causes; whereas the latter, needs not to instruct the onerous Cause of Rights granted to him, otherwise than by the Narrative of the Writ. But, according as the Relation betwixt the Granter and Receiver of a Writ is near or remote, and the Presumption of the Latter's Honesty strong or weak, more or less Proof of the onerous Cause is sustained. Where a Disposition to a conjunct Person bears for Love and Favour, it will be reduced as such, tho the Receiver should undertake to instruct, that he had it for an onerous Cause, unless the Prefumption arifing from the Narrative, that it was given merely on the Score of Liberality, and Affection, be taken off, by clear contrary Evidence.

If any Third Party, not Partaker in the Fraud, acquire lawfully the Thing alienated from the first fraudulent Receiver, for a just Price, or in Satisfaction of lawful Debt, the Right made to him shall stand good. But the Receiver of the Price is obliged to make the same forthcoming to the Bankrupt's lawful Creditors: Deducting what he hath already paid to any of them without partial Favour, conform to their Diligences; and answering sor the Remainder to such, as want to be paid (a), according as they shall affect the same by their respective Diligences.

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Tho' Deeds for a valuable Confideration, in Favour of conjunct or confident Persons, are not quarrellable by anterior Creditors, who had done no Diligence against the Disponer: Yet the Dyvour, or his interposed Confident, privy to the Fraud, cannot, to the Prejudice of the more timely Diligence, by Inhibition or Arrestment, Horning, Comprising, or Adjudication, or other Ways, used by one Creditor to affect the Bankrupt's Estate or Price thereof, gratify another Creditor, by any voluntary Payment or Right of the Estate. For such Right is reducible, at the Instance of the User of the Diligence, to whom the Creditor preferred by partial Favour, is liable to make Forthcoming what he fo received (a). Which is not fo to be understood, as if any of these Diligences were a sufficient Ground, to quarrel promiscuously any Right granted by the Bankrupt to his beloved Creditors: But applicando fingula fingulis, that heretable Rights may be questioned by the Users of Horning, Inhibition, or Comprising, and Dispositions of Moveables, by fuch as have used Horning or Arrestment. Nor are Creditors, who have completed their Diligence only so privileged; but even those, who are in a Course of Diligence, or have only made some Steps therein, as by Execution of Horning, Inhibition, or a Summons of Adjudication, or by Denunciation of Lands to be apprifed; or, by a Charge upon

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a Precept of Poinding; provided fuch Creditors have not too long delayed to complete their

imperfect Diligence.

Heretable Rights granted by a Person insolvent, to one or more of his Creditors, to the Prejudice of the current Diligence of others, are reducible at their Instance, even against third Parties innocently acquiring from the Creditor prefert'd: But a third Party so acquiring a Right to Moveables, from such an interpos'd

Creditor, could not be quarrelled.

For yet farther restraining the Frauds of Bankrupts, if any Debtor, under Diligence by Horning and Caption, at the Instance of his Creditor, be either imprison'd, or retire to the Abbay, or other privileg'd Place, or flee, or abscond for his personal Security, or defend his Person by Force, and be afterwards found, by Sentence of the Lords of Seffion, to be infolvent; shall be held and reputed upon these joint Grounds of Horning, Caption, and Infolvency, with one or other of the faid Alternatives of Imprisonment, retiring, or flying, or absconding, or forcible defending, to be a notour Bankrupt from the Time of his faid Imprisonment, retiring, flying, absconding, or forcible defending (a). A Person may be declared a notour Bankrupt, by Sentence of the Lords of Session, in a Process raised and prosecuted by any of his just Creditors. And being declared such, all voluntary Deeds made directly, or indirectly by the

⁽a) Act 5. Seff. 6. Par. K. W.

Ch. i. Law of Scotland. Tit. 10. 209

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the Bankrupt, at, or after, or in the Space of fixty Days, before his becoming fo, in Favour of any of his Creditors, whether in Satisfaction, or for Security, are void and null. And heretable Rights, whereupon Infeftment may follow, are reckoned, as to this Cafe of Bankrupt, to be only of the Date of the Seifin, without Prejudice to their Validity as to other Effects (a).

Law doth not only reduce and annul fraudulent Deeds, to the Prejudice of Creditors, but also punish the Granters and their Accessories; who are reputed dishonest, salse, and insamous, incapable of all Honours, Dignities and Offices, or to pass upon Inquests, or to bear Witness in, or out of Judgment (b). The fraudulent Bankrupt is also punishable by Banishment, or otherwise, (Death excepted) as the Lords of Session shall see Cause (c).

Lands, or Annualrents, or double Assertions of Lands, or Annualrents, or double Assertions or Assignations; and a Superior, who wittingly receives double Resignations, are declared infamous, punishable in their Persons and Goods (d), and guilty of the Crime of Stellionate (e).

12. Usury, called also Ocker, is the taking at any Time more than the legal established interest for Money, directly (f), or indirectly, under the Colour of Back-tack Duty, in Money

⁽a) Act 5. Seff. 6. Pari K. W. (b) Act 18. Par. 23. 9. VI (c) d. Act 5. Seff. 6. Par. K. W. (d) Act 105. Par. 7. 9. V. (r) Act 140. Par. 12. 9. VI. (f) Act 222. Par. 14. 9. VI.

or Victual, or under the Pretext of buying and felling (a), or obtaining a proper Wadfet in

tract is void, and the Offender forfeits treble

the Value of the Money, Wares Merchandize,

and other Things so lent, bargained, &c. (e).

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Lands, exceeding in Annualrent the Interest of the Money lent, with a Provision, that the Granter of the Wadset should bear all Hazard of the Rent (b), or taking the ordinary Annualrent before-hand (c). The usurary Bond, or Contract, may be reduced at the Instance of the Party injur'd, with the Concurrence of the King's Advocate, or at his Instance, without the Party: And being reduc'd, the principal Sum, with the ordinary Annualrent unpaid, falls to the King or his Donatary. But the Party, if he concur with His Majesty's Advocate, (and no otherwise) is entitled to recover from the Usurer the exorbitant Profits exceeding the ordinary Annualrent paid to him (d). Now, when more than the legal Interest is taken for the Loan of Moneys, Wares, Merchandize, or any other Commodities, the Con-

rent or Caution boration Obliga

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(a) Act 247. Par. 15. J. VI. (b) Act 62. in fin. Par. 1. Seff. 1. Ch. II. (c) Act 28. Par. 23. J. VI. (d) Act 247. Par. 15. J. VI. (e) 12. A. Seff. 2. Ch. 16.

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(e).

Of Accessory Obligations.

A Accessory Obligation is, That which is made for the Sake of another. Such are, 1. The Obligation for Annualment or Interest of Money. 2. Pledges. 3. Cautionry, or Suretiship. 4. Bonds of Corroboration. 5. Letters of Credit. And, 6. The Obligation arising from Oath.

TIT: I

Of Annualrent, or Interest of Money.

A Noualrent, or Interest is, a Reward, or moderate Profit due by the Debtor of a Sum of Money to the Creditor, for the Use which the former had thereof, and the other wanted. The Money for which Interest is claimed, is called Sors, the Stock or principal Sum.

2. Interest is fix'd by Law at a certain Proportion of so much in the Pound every Year, and for more or less Time in Proportion: Which varies in different Nations, and hath not been always the same among us; but now stands at 5 per Cent. (a).

3. Annualrent is due, either by Agreement of Parties, or by the Provision of Law:

O 2

[1.] 'Tis

(4) 12. A Seff. 2. Ch. 16.

[1.] 'Tis due not only by express, but by tacit Agreement, inferr'd from bygone Use of Payment, or Paction for Interest of Years

preceeding.

[2.] Annualrent is due by Provision of Law.

1. For Sums in all Bills of Exchange, Foreign or In-land (a).

2. To Cautioners paying Debt upon Distress.

3. To Minors by their Tutors and Curators (b).

4. For the Price of Land from the Term of Payment, where the Buyer gets the Profits of the Land.

5. Interest is sometimes allowed to Merchants, in Lieu of Damages.

6. By the Debtor's being denounc'd to the Horn for not Payment.

4. The Course of Annualrent once due, stops and ceases, when the Debt is paid or acquitted; or orderly consigned upon the Creditor's Refusal, or by Compensation upon another liquid Debt due by the Creditor to the Debtor.

T I T. II. Of Pledges or Pawns.

A Pledge, or Pawn in general is, an Appropriation to a Creditor, of the Goods or Estate of his Debtor, moveable, or immoveable, for Security of the Engagement he lies under, till it be fulfilled, or acquitted.

2. 'Tis divided into a Pledge, properly for called, and a Wadfet, whereof the former only falls

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⁽a) Act 20. Par. 3. Ch. II. junct Act 36. Sef. 6. Par. K. W. (b) Vid. Part I. B. I. Ch. 2. Tit. 3. 5 2.

falls to be explain'd here, the latter being treated of elsewhere (a).

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3. A Pledge in a proper Sense is, an Obligation, whereby a Creditor has Right to the Moveables of his Debtor, till he be paid or satisfied.

by Paction; or legal, that is, acquired by the bare Effect of the Law.

[1.] A conventional Pledge is, an Obligation, by which a moveable Thing is given by a Debtor to his Creditor, for Security of the Debt, on Condition, that when the Debt is paid, the same individual Thing shall be return'd.

The Creditor is accountable for what Prejudice happens to the Pledge in his keeping, throwany Fault, which a careful and circumspect Person would not readily be guilty of; and would not use it, against the Will of the Owner, it being given him as a Security, not for Use.

A Creditor cannot lawfully stipulate, that if he is not paid at the Term agreed on, the Pledge shall from thenceforth be his, in Lieu of his Payment, called Pactum Legis Commissoria, which is disallowed by Law, as contrary to Humanity and good Manners. But the Creditor may procure Leave from a Judge, to have the Pledge apprised and sold; or may assign his Debt to a Trustee, who may arrest it in his Hand, and pursue a Forthcoming thereof.

(4) Vid. Part III. B. I. Ch. 1. Tit. 2, § 3.

If the Creditor has been at any necessary Charges for Preservation of the Pledge, the

Debtor is bound to reimburse him.

[2.] A legal Pledge is, a Right of Pledge. which a Creditor acquires by Law in his Debtor's Goods, without being put in Possession of them, called a tacit Hypotheck. Tacit Hypothecks in Force with us, are, 1. That competent to Heretors of Country Land, for a Year's Rent, in the Fruits of the Ground, or these falling thort in the Goods thereon; and to Proprietors of Houses for a Years Rent, in the Goods brought into them. 2. To the Superior for his Feu Duty. 3. To Titulars of Tithes, and Ministers for their Stipends, payable out of the Tithes. 4. Seamen have a tacit Hypotheck upon the Freight, for their Wages. And s. The Repairer of a Ship hath a tacit Hypotheck upon her for his Expences.

5. Payment of a Debt, or what is equivalent to Payment, extinguisheth a Pledge, or Hy-

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Of Cautionry or Suretiship.

1. C'Autionry or Suretiship is, an Obligation to pay a Sum, or perform a Deed for another bound jointly for the same. The Person so obliged is term'd a Cautioner, Bail, or Surety: Because, the Creditor following his Faith,

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Faith, doth contract with the Person undertaken for, who is called the principal Debtor.

2. Cautionry may be accessory to an Obligation, that is not altogether null; the Action be not essecuted against the principal Debtor, because of some Privilege by Statute or Custom, upon the Account of Minority, &c. But, where the principal Obligation is quite null in it self, as being granted by a Fool, or not subscribed by the principal Debtor, the Cautioner is free:

3. Cautioners cannot, as such, be sued, till after the Creditor has used all necessary Diligence against the principal Debtor, and such Effects as he has; which is called the Benefit of Discussion. When there are several Cautioners for the same Debt, who are all solvent, the Creditor can demand from each of them only his Share of the Debt; which is called the Benefit of Division: Tho' the Shares of infolvent Co-cautioners are thrown upon the rest, who are solvent proportionably. But, if Cautioners oblige themselves, as is usual, jointly and feverally with the Principal, they, and every one of them are, with Regard to the Creditor, in the same Condition as the Debtor, and understood to have renounced the Privileges of Discussion and Division. So that the Creditor may purfue any one of them for the whole. Debt, without feeking after the principal Debtor, or other Cautioners, tho all of them be able to pay.

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4. Cautioners have no Relief against the principal Debtor, till they be distressed: Nor, yet for Payment upon Distress, unless they intimate the same to the Principal, before Litiscontestation; if he the Principal had a relevant Defence against the Creditor. But otherwise, a Cautioner may bring Action of Relief against the principal Debtor, and his Heirs, not only for the principal Sum and Annualrent paid to the Creditor; but also for Annualrent of the said Principal and Annualrent, and for all other Damage and Expence incurred thro' the Cautionry without he Fault.

Debt, he may obtain Relief thereof from the rest, deducting his own Part. But then he must communicate to them, the Benefit of any Ease got from the Creditor by Transaction, but not such as he got by mere Gratification, as a

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Friend or Relation.

6. Cautionary Engagements in any Bond or Contract for Sums of Money, by Perfons named Cautioners, or having either a Clause of Relief in the Bond, or a Bond of Relief, a Part intimated personally to the Creditor at his receiving Bond, continue no longer than seven Years from the Date: But any legal Diligence against the Cautioners, for what fell due in that Time, stand good, and hath its Essect after the seven Years (a). In which seven Years, those of the Creditors Minority are not deducted, to preserve

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⁽a) Act 5. Seff. 5. Par: W: and M:

Ch. 2. Law of Scotland. Tit. 4, 5. 217

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T J T. IV.

Of Bonds of Corroboration.

A Bond of Corroboration is, a new Bond to strengthen a former, or other Obligation granted by the Debtor therein, or any other Person, to the original Creditor, or to his Representatives or Assigny, without Prejudice or Derogation to the former Bond or Obligation, or to any Diligence that has sollowed, or may follow thereupon.

TIT. V.

Of Letters of Credit.

A Letter of Credit is either general, or spe-

A special Letter of Credit is, an open Letter bearing Orders to furnish such a Man with such a Sum, at one or several Times, upon his Bills of Exchange, or Receipts, and to charge it to his Accompt, who gives the Letter of Credit.

A

4. Cautioners have no Relief against the principal Debtor, till they be distressed: Nor, yet for Payment upon Distress, unless they intimate the same to the Principal, before Litif-contestation; if he the Principal had a relevant Defence against the Creditor. But otherwise, a Cautioner may bring Action of Relief against the principal Debtor, and his Heirs, not only for the principal Sum and Annualrent paid to the Creditor; but also for Annualrent of the said Principal and Annualrent, and for all other Damage and Expence incurred thro' the Cautionry without his Fault.

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(a) Act 5. Seff. 5. Par: W: and M:

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TIT. V.

Of Letters of Credit.

A Letter of Credit is either general, or special.

A special Letter of Credit is, an open Letter bearing Orders to surnish such a Man with such a Sum, at one or several Times, upon his Bills of Exchange, or Receipts, and to charge it to his Accompt, who gives the Letter of Credit.

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A general Letter of Credit is, an ample Letter directed to some particular Correspondent, or to any Person who shall advance Money thereon, to such a one, without Restriction as to Time or Place, or Sum, or other Circumstances, obliging the Writer for Repayment, and for Annualrent to the Possessor of the Bills.

TIT. VI.

Of the Obligation arising from Oath.

A N Oath is, a religious Invocation of the Name of Almighty GOD, to affure the Truth of what is done; or a calling

GOD to witness the same.

2. The Form of an Oath with us is, by pronouncing with an uplifted Hand these Words, By GOD Himself, and, as I shall answer to GOD at the Great Day, &c. But, instead of this Form, a Quaker is permitted to make the solemn Affirmation or Declaration following, viz. I A. B. Do solemnly, sincerely and truly, declare and affirm (a).

3. Oaths may be divided into Promissory, and

Decifive Oaths.

[1.] A Decifive Oath is that, which is taken in Judgment by a Witness, or, by one of the Parties, which falls in more properly to be spoke of afterwards (b).

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⁽a) 7, & 8. W. III. ch. 34. 13, & 14. W. III. ch. 4. 1. G. Seff. 1. Ch. I. junct. 8. G. ch. 6. (b) Vid. Part IV. B. I. chap. 2. Tit. 1. § 2.

[2.] A Promissory Oath, which is used to enforce or corroborate an Engagement, is a religious Invocation, whereby one doth facredly promise, either actively to perform Something.

or passively never to quarrel it.

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To make fuch an Oath binding, the Obligation must be lawful, and not forbidden. Effectual Obligations may be fortified, by the Accession of an Oath, taken to observe and fulfil them. But, tho' a Partie's Oath to obferve a Thing ineffectual in Law, will hinder him to quarrel it, the Judge may refuse to fulfain it. A Right formal in the Essentials. tho' labouring under circumstantial Defects, as a Deed extorted by Force or Fear, may be supported by the Party's Promissory Oath, never to quarrel ir. But Obligations of Minors confirm'd by Oath are null, and the Persons infamous, who made them swear (a).

4. Having thus opened the Nature and Effect of Obligations or personal Rights; and the several Kinds of them; how they are form'd, and in what particular Manner special Obligations are dissolved: I shall now explain the common Ways, how Obligations or personal

Rights are annulled, and extinguished.

CHAP!

CHAP. III.

How Obligations or personal Rights are annulled and extinguished.

Obligations, are either by Agreement of Parties, or by Performance': Which, according as the Obligation was entered into, with, or without Writ, or, according to the Manner of the Satisfaction given, require, or do not require to be infiructed by Writ. But all Ways of extinguishing Obligations, may be prov'd by Writ, or Oath of the Creditor.

2. If it be agreed, never to crave Payment or Performance of an Obligation: This, if made with a fole Debtor, imports a passing from an Obligation; but, if made with one of more Persons bound for the same Debt, is essectual only to free him, and Payment may be required from the rest, who yet have Re-

lief against him for his Share thereof.

3. Performance of Obligations, which is their attaining the defigned Effect, is either Real and Proper, or Improper and Imaginary. Real or Proper Performance is, Payment or Confignation. Improper and feigned, or Imaginary Performance is, by Something equivalent in Law to Real Performance, such as, Dif-

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Law of Scotland. Tit. r. Ch. 3.

Discharges, Compensation, Innovation, and Confusion.

TIT. I. Of Payment.

1. DAyment is a fatisfying the Obligation in the precise Terms of it.

2. Payment must be made of the same Thing in Kind, which one owes, as Money for Money, Goods for Goods; unless the Creditor confent to take some other Thing in Stead of it. Nor can he be forc'd to receive Payment in Part, unless it was so agreed, or to receive in a Species of Money, that is just going to be cried down.

3. In an Alternative Obligation to one or other of two Things, the Debtor has the Election what to pay, which he loses, after the Creditor has made his Demand by Process.

4. When several Debtors are bound to the Creditor jointly, they are liable only pro Rata, if all be folvent, and the Shares of the infolvent ly upon the solvent Debtors. But, if they are bound jointly and feverally, or bound jointly to deliver a Thing, or perform a Deed that is indivisible, they are liable in solidum. Obligations expressing no Term of Payment, or Performance, are to be paid or perform'd immediately: That is, Money must be paid within 24 Hours, and a Work must be perform'd within such a Time, as is necessary to do it.

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ch is either inary. nt or Imauivah as, Diloffered to him, the Debtor may take Instruments upon his Offer, and the Creditor's Refusal, and deposite the Money in the Hands of the Clerk of the Bills, which is called Consignation. Due and orderly Consignation, is equivalent to Payment, stops the Course of Annual rent, and frees the Consigner from the peril of the

Money (a).

6. A Person owing several Debts to one and the same Creditor, is at Liberty to pay which of them he pleases first. Yea, tho' he don't declare his Mind at the Time, concerning the Application, he may make his Election thereafter, while he is able to pay all the Debts, but no longer. Where Payment is made without Application to any one Debt, it is imputed to extinguish such Debt as lies heaviest upon the Debtor, and concerns him most to discharge. But partial payment of a Debt bearing Annualrent, is applied, in the first place, to the discharge of the bygone Interest, and the Overplus to the discharge of Part of the Principal Sum.

7. Payment Via Facti, as by the Creditor's Intromission with Victual-rent of the Debtor's Lands, &c. may be prov'd by Witnesses But Payment of Money must be cleared by Writ, or Oath of Party. But sometimes Payment is presum'd: As Payment of a Bond retired by:

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and in the Custody of the Debtor, or which the Creditor cannot produce, unless the contrary be proven.

T 1 T. II.

Of Discharges:

A Discharge is, an Acquittance or Release in Writing, granted by the Creditor to the Debtor, acknowledging that he hath got Satisfaction from him, whether he hath got Payment, or not.

2. Total Discharges of Obligations must be writ upon stamped Paper (a): But partial Discharges or Receipts of Annualrents are good upon any Paper. A Discharge regularly requires the same Solemnities as written Obligations: But Discharges or Receipts by Masters to their Tenants of their Rents, and by Merchants and Factors in Mercantile Business, are sustained, the not holograph, and wanting

3. Discharges are either General, or Particular,

A general Discharge, which is, an Acquittance from all Claim, either in general Terms, without mentioning Particulars, or mentioning Particulars, with a general Clause subjoined.

A general Discharge specifying no particular Uses not to be extended to Clauses of Warrandice, or Relief, or Obligements to insest,

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⁽a) 12. Act Ch. 9.

or purchase real Rights. A Discharge of many particulars expresly, with a general Claufe, is not extended to Particulars of a different Kind or of greater Importance than those expresly mentioned. But a general Clause in a Difcharge, doth reach Particulars of greater Consequence than those expresly mentioned, if all be of the same Nature.

4. Three particular Discharges of Rents, or Annualrents of three Years or Terms immediately subsequent to one another, according as the Payment is annual or termly, infer a Prefumption of Law, that all Preceedings are fatisfied, if the Granter of the Discharges had Power to discharge all bygones: Unless it appear by good Proofs, that the Arrears of former Years are still due, But one Discharge for three Years or Terms, or two Discharges of two Years or Terms, and particular Receipts making up the third, or partial Receipts for more than three Years Rent, do not work this Pres fumption.

TIT. III.

Of Compensation;

1. TITHEN two Persons become mutually Creditor and Debtor to one another, Exception made upon the one Debt, excludes Action for Payment of the other, either wholly, if both Debts be equal, or for so much as the least Debt amounts to: Which Exception is called Compensation. 2, It

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2. It is not sufficient to make a Compensation, that there be a Debt on the one Side and
the other; but it is moreover necessary, 1:
That both the Debts be liquid and clear, that
is, certain, and not liable to dispute. 2. They
must consist in Quantity, and of the same
Kind and Quality. 3. They must be such as
are already due, and not such as are conditional,
or whereof the Payment is suspended to a Day.
In short, no Debts can compensate one another, except such as can be offered in Payment.

3. Compensation lies not only against a Creditor for his own Debt, but against an Assigny upon a Debt due by the Cedent to the Debtor himself, before he was denuded by Intimation of the Assignation; but not against the Possessor of a Bill of Exchange, upon the

Indorfer's Debt prior to the Indorfation.

4. Compensation must be instantly verified, and cannot be sounded on by Suspension or Reduction after Sentence (a). When a Debtor, having several Debts owing to him by one Person, sues for Payment of one of them, if the Desender object Compensation upon a Debt due to him by the Pursuer, he the Pursuer may reply upon another of these Debts owing to him by the Desender: Which is termed Recompensation.

5. Compensation stops the Course of Annualtent of the Debt compensed, tho the compensating

⁽⁴⁾ Ad 141, Par. 12, 7. VI.

fating Debt bore no Annualrent, from the Time that both Debts concurr'd.

TIT. IV.

Of Novation or Innovation.

fubstituting a new Obligation in the place of a former. 'Tis distinguish'd into Novation, properly so called, and Delegation. Novation in a proper Sense happens, when the Nature of the Obligation is changed betwixt the same Creditor and Debtor: As when a Debtor for the Price of Goods sold, takes a Bond of borrowed Money for it; or a Debtor by Bond or Ticker, takes a Bond bearing Annualrent for the Sum, or a Clause of Infestment.

Meaning of Parties, not to corroborate the former Obligation, tho' no Reservation there-of be made in the new Obligation. It hath this Effect, that the former Obligation with all its Accessories, are thereby extinguished.

3. Delegation is, when a new Debtor is put in lieu of the former, and charges himself with the Debt owing by the former, or grants a new Bond for it to the Creditor. Whereby the Obligation of the Person who delegates, is extinguished by the Obligation of him who is delegated.

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TIT. V.

Of Confusion.

Confusion is, when the Debt and Credit meet in the same Person; or, when one becomes Debtor and Creditor to himself, as when the Creditor is Heir or singular Successor to the Debtor, or the latter to the former, or a Stranger to both.

2. This confounding one Right with another, extinguisheth the Debt, except a Debtor becoming Creditor in Manner aforesaid, has no Relief of such Debt against some other Person. Which Extinction is sometimes Absolute, and sometimes only Temporary:

3. Having explain'd Original Property, Real and Personal, I shall in the next Place consider, how both may be transmitted and passed over by Progress, from one to another:



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Of Confession.

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PART III.

How Estates may be transmitted and passed over by Progress from one to another, whether a singular or universal Successor.

BOOK I.

Of the Transmission of Property to singular Successors.



Singular Successor, is he, who acquires any Right or Thing, by a particular Title, for some Cause If for Value given, or for valuable

Consideration, the Acquirer is termed a singular Successor, for an onerous Cause; and if for Love, or on the Score of Affection and Liberality, he is stilled a sucrative Successor. The Person who conveys the Right or Thing in favour of another, carries the Name of Author:

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Property is conveyed to fingular Successors, either by voluntary Deeds of Alienation, or by the legal Diligence of Creditors, or confiscated.

CHAP. I.

Of voluntary Deeds of Alienation.

are Disposition and Assignation. In both which, there is ordinarily a Clause of Warrandice (a). Whatever Right concerning a Thing conveyed falleth afterward to the Author, it accrueth to his singular Successor, as if it had been expressly conveyed to him: And Conveyance of the Property, doth virtually carry any lesser or inferior Right thereto, if no more was in the Author's Person.

TITLE L

Of Dispositions.

DISPOSITIONS are either irredeemable and absolute, or redeemable.

An absolute Disposition is either a single Disposition of real Rights of Lands, or others, made by one to another, for a certain Price, or for Love and Favour, which is properly term'd a Disposition; or, a mutual Disposition on

(4) Vid. Part 2. B. 2. Chap. I. Tit. I.

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SECT. I.

Of Dispositions properly so called.

1. A Disposition is a written Deed, by which real Rights of Lands and the like, completed by Infestment, are conveyed from one, called the Disponer, to another.

2. Such Rights are disponed, to be held either of the Disponer's Superior, by Resignation or Confirmation, called a publick Right, or a Right a me, or they are disponed to be held of the Disponer, called a base Holding, or a Right de me (a).

3. Refignation is either made by the Vassal himself, called Resignation propriis manibus, or by one having a Procuratory from him, by the symbolical Delivery of a Pen (called Staff and Bastoun) to the Superior, or one commissioned by him for that effect. If the King be Superior, Resignation is made to the Barons of Exchequer. Resignation is made either in saverem, upon a Disposition to the Vassal himself, and his Heirs therein mentioned, or to some Third Party and his Heirs, to whom the Superior or his Commissioner, in Token of Acceptance, redelivers the Pen; or ad perpetuam remanentiam, upon a Disposition to the Superior

⁽a) Vid fupra Part 2. B. 1. Chap- 2. Tit-4.

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whose favour Resignation is made, takes Instruments (called an Instrument of Resignation) in the Hands of a Notary. Instruments in favorem want not to be recorded, but an Instrument of Resignation ad remanentiam, must be recorded as Seisines, within 60 Days (a). Procuratories of Resignations are sufficient Warrants, for making Resignation after, as before the Death of the Granters, or Parties to whom they are granted, or both; provided that Instruments of Resignation, taken after the Death of either Party, express the Titles of those in whose favour Resignation is made, otherwise they are null (b).

4. A Refignation ad remanentiam, acccepted by the Superior, and duly registred, doth, without more ado, fully denude the Vassal, and confolidate the Property with the Superiority, as it stood the Time of the Resignation, affe-Aed with all its real Burdens, tho constituted without the Superior's Confent. But a simple Refignation in favorem, doth not denude the Refigner, without Infeftment following in the Person of the Resignatary. Hence the first Infeftment upon a fecond Refignation, will be preferred to the fecond Infeftment upon the first Resignation. But so soon as Infestment hath followed in the Person of the Resignatary, the Resigner is fully denuded, and so cannot tranf-

⁽a) Act 3. Parl 2. Seff. 1. Ch. II. (b) Act 35. Seff. 4. Parl. W. and M.

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ken, the Superior gets his Casualities, not by him in whose favour Resignation is made, but by the Resigner, who continues Vassal till the other be intest.

5. Upon an Instrument of Refignation, made in Exchequer, a Signature of Refignation drawn and marked by a Writer to the Signet, is enter'd in a Roll affixed to the Exchequer Wall, by the Presenter of Signatures; which, after it hath stood there some Days, he presents to the Barons, and they finding it agreeable to the former Charters, do país Then a Composition being paid by the Party, the Signature is casheted, and recorded in the Books of Exchequer; and a Precept under the Signet (for the Warrant whereof the Signature is left) directed to the Keeper of the privy Seal. The Writer to the privy Seal, upon Sight of this Precept, writes another Precept, directed to the Keeper of the great Seal, and records the same in the Register of the privy Seal. On the Back of which Precept he attests it to be written and recorded by him. To this last Precept the Keeper of the privy Seal appends the same, and keeps the Precept under the Signet for his Warrant. Then the Director of the Chancety writes a Charter containing a Precept of Seiline, and records the same in the Register of the great Seal, and indorfes it with an Atteltation of its being written and recorded by him. To which Charter the great Seal is ap-

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pended by the Keeper thereof, who retains the Precept under the privy Seal as his Warrant. But Signatures and Charters of the Vassals of Bishops, and their Chapters, whose Valuation is but 100 Lib. or under, pass the great Seal per saltum, gratis, without Payment of any Composition in Exchequer, or other Dues (a). And the Vassals of Church Lands in Orkney and Zetland, not exceeding 20 Lib. of Valuation, bruik by the Udal Law (b).

6. When Intestment is taken upon a Disposition a me, without Resignation, it is null, till it be confirmed by the Superior's Charter of Confirmation, and the last Right first confirmed, is preserved cateris paribus (c). In a Competition of such as have Confirmations from the Sovereign, he who gets his Charter sirst past the Seals, is preserved. A Confirmation obtained, makes the Insestment confirm'd essectual retro, from the Date of the Insestment; unless some Impediment intervene, which him ders the Right to take Essect by Confirmation.

7. A Subject Superior is not obliged, except he please, to accept of Resignation in favorem, or grant Confirmation to a singular Successor upon a voluntary Disposition made by his Vasial. But in case of the Superior's Resulas to do so, the singular Successor may, by getting from his Author a Bond for a Sum equi-

(a) Act 32. Seff. 2. Parl. W. and M. junct. Act 11. Seff. 7. Parl. K. W. (b) D & Act 32. (c) Act 66. Parl. 5. Jam. VI.

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equivalent to the Price of the Lands, and adjudging the same for Payment, force the Superior to enter him upon a Charge. The Barons of Exchequer do not resuse Resignations made by the King's Vassals, or Confirmations to them.

8. When a Superior receives a fingular Successor, he may claim a Year's Rent of the Lands, as an Acknowledgment for changing his Vaf-

9. Confirmation of Rights de me, or base Rights by the Superior, doth not render them publick Rights, or make the Person whose Right is confirmed, immediate Vassal to the Superior confirming, but only hinders the Superior from claiming any Casuality arising to him, through Deeds of the Vassal, wanting his Consent. Yet Confirmation of Seisine, taken upon a Precept in a Disposition, obliging to insest de me and a me by Confirmation, to neither of which the Precept or Insettment hath special Relation, makes it a publick Right.

mobs A 'SECT. II:

Concerning Contracts of Excamtion.

A Contract of Excambion is a mutual Deed, by which two Parties exchange Lands for Lands, they, on both Sides, dispone to one another. If either of the Lands exchanged, before Delivery of Possession, appear to belong to a Third

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Party, the Owner of the other, may refuse to quite Possession thereof, and if evicted after Delivery of Possession in the other, the Contract becomes void, and he from whom the Lands taken in Exchange is evicted, hath Regress or Recourse to what he gave in Exchange. In which Case he would be preserved even to singular Successors insest in such Lands, upon Rights from him who got it in Exchange, the preceeding the Eviction.

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Of redeemable Dispositions,

A Redeemable Disposition is the Conveyance of a real Right for a Time, so as it may be redeemed or recovered, and the Disponer may enter again into his Right, upon certain Conditions, as the Repayment of Money, for which the Conveyance was made, oc.

Under redeemable Dispositions I comprehend Reversions, or Powers of Redemption, Dispositions containing a reserved Faculty to alter, and Wadsets.

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Of Reversions, or Powers of Redemption.

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nption s alienatnated for Value received, or carried away by the Diligence of Creditors, in Satisfaction of Debt. He to whom this Power of Redemption belongs, is called the Reverser.

2. Reversions are either of Moveables, which are touched in another Place (a), or of

Lands.

3. Reversions of Lands are either legal, which arise from the Provision of Law, or conventional.

4. Legal Reversions are those competent, by the Essect of Law, to Superiors of Lands apprised or adjudged from their Vassals, or to the Persons from whom these are apprised or adjudged; of which I have spoke in the proper Place.

by which it is agreed, that a Seller may redeem or get back a Thing fold, he restoring the Price to the Buyer, either simply or indefinitely, without expressing the Time, or within a fixed Time. If this Power is granted indefinitely, it lasts as long as the Time limited for Prescription. When it is restrained to a certain Time, it must be exerced within that Time.

6. Conventional Reversions with us are strictissimi juris, most strictly observed in the precise Terms therof. For, 1. They are not extended to Heirs or voluntary Assignies, unless conceived expressy in their favour: But for Commerce sake, may be apprised or ad-

judged,

(a) Vid. Part 2. B. 3. Tit. 7. Sect. I. N. 8.

judged, the Heirs or Affignies were exprelly excluded from the Benefit thereof; and after an Order of Redemption used by the Reverfer, he may affign the Reversion. 2. Conditions of Reversion cannot be fulfilled in equi-

pollent Terms.

7. Such Reversions are, 1. Either ingrossed in the redeemable Right, or granted in a Paper apart. 2. They are simple or conditional. 3. They are either folemn and perfected, or only inchoated, as Promises and Bonds to grant Reversions. 4. Reversions are either principal or accessory. A principal Reversion is that, whereby a Right is declared redeemable, upon Payment of the principal Sum for which it was granted, and the Annualrents thereof. An accessory Reversion is that, by which the Reverser (who, after granting of the redeemable Right, borrowed more Money from the Receiver thereof) declares, that he shall not use an Order of Redemption, till the Money last borrowed as well as the first be paid. This we call an Eik to Reversion.

8. Reversions of Land-rights, stand good against singular Successors (a). But such Reversions not incorporated, Assignations, Difcharges, and Eiks to Reversion, are to beregistred as Seisines, within fixty Days of the Date; and Bonds for making Reversions, with in the like Time, after Seisine taken by the Makers thereof; otherwise they are effectual

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⁽a) Act 28. Parl. 5. Jam. III.

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only against the Granter and his Heirs, and not against singular Successors; whether the Right under Reversion be of Country-land (a), or of Tenements within Burgh (b).

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Of Dispositions containing a reserved Faculty to

upon Payment of the Money in the Way WHERE Dispositions of Lands contain a referved Faculty to alter in favour of the Difponer, without Mention of his Heirs, he may exercise the Faculty, even after the Lands are fallen in Nonentry, or Ward; by the Death of him to whom they were disponed, and thereby determine and put an End to fuch Cafualities: The Faculty may also be adjudged by the Disponer's Creditors; but it dies with himself, if not exercised before his Death. A reserved Faculty to alter at any Time during the Difponer's Life, without the Words, etiam in articulo mortis, or upon Death-bed, in a Disposition made by the Disponer to a Stranger, or any who is not apparent Heir, may be exercised by the Disponer on Death-bed. But such a reserved Faculty, or even a Faculty to alter upon Death-bed, in a Disposition to the Disponer's apparent Heir, can be exercised by the Disponer only in liege pouftie. to sind Hould to brusch aid a SECT.

II. (4) Act 16. Parl. 22. Jam. VI. (b) Act 11. Parl. 3. Ch.

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only seainth the Granter and his Heirs, and nor equipped fing in . To sign whether the Rich under Keverhoube of Country-land (4).

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real Right of Lands or others passing by Infeftment, is transmitted from one to another, in Security of a special Sum, and redeemable upon Payment of the Money in the Way and Manner therein expressed. Which Disposition is perfected by Infestment, to be held either of the Disponer, or of the Disponer's Superior. The Person to whom a wadset Right is granted, is called the Wadseter.

Disponer's Superior, the Disponer sometimes takes Letters of Regress from the Superior, obliging him to receive back his Vassal, when he shall redeem his Lands. Which the Superior would not otherwise be obliged to do, except he please, if the Reversion be not incorporated in the wadser Right. Regresses, Assignations and Discharges thereof must be registred as Seisines, within fixty Days of the Date, and Bonds for making Regresses, within the like Space, after Seisin taken by the Wadsetter (a).

3. A Wadlet is either proper, or improper.

4. A proper Wadset is, where the Wadsetter takes his Hazard of the Rents of the Lands,

(a) Act 16. Parl. 22. Jam. VI. junct. Act. 11. Parl. 3. Ck. II.

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or others wadfet, in Satisfaction of his Annualrent of the Sum for which the Wadfet was given, and pays all publick Burdens. A proper Wadletter is not accountable for his Intromiffions with the Rents, till the Wadfet be redeemed, tho far exceeding his Annualrents.

. An improper Wadfet is, where the Granter of it pays all publick Burdens, and upholds the Rents, and the Wadfetter runs no Hazard, but hath his Annualrent fecured to him in all. Events. Sometimes an improper Wadfetter, not desirous to enter to the natural Possession of the wadlet Lands, fets the same in Tack to the Granter of the Wadset, or to his Trustee, for Payment of the Annualrent of his Money. as the Tack-duty, which is called a Backof the wallings off a will defect

6. It is Usury to take a proper Wadfer of Lands, exceeding in Rent the Annualrent of the Money lent, with a Provision that the Creditor shall not be liable for the Hazard of the Fruits and Rents (a), or for any Wadletter to fet a Tack to the Heritor, or other Person to his behoof, for Payment of a Duty in Money or Victual, exceeding the Annualrent of the Sum for which the Wadlet was granted (b).

7. The Reversion may be affected with a Tack in favour of the Wadletter, to commence after Redemption of the Wadlet; for the true Mail, or near thereto, (c) that is, for more and a side former tong hardthan

⁽a) Act 62. Parl 1. Seff 1 Ch II in fin. (b) Act 247. Parl 15. Jam VI. (c) Act 18. Parl 6 Jam II.

than the Half of the real Dury, which is good against singular Successors, to be reckoned according to the Worth of the Lands at the granting of the Wadset. But such Tacks for half Mail, or less, are null (a) and usurary. A Clause irritant in the Reversion of a Wadset, that the Money not being repaid at a precise Day, the Reversion should expire, and the Lands become irredeemable, called pactum legis commissaria in Wadsets, is disallowed as usurious and unjust. Notwithstanding whereof, the Money may be offered at the Bar, any Time before Dispute in a Process, for declaring the Irritancy incurred.

8. A Wadfet is extinguished either by Law,

or Confent.

9. Law takes off a Wadlet, by a Declarator of Redemption, proceeding upon Premonition, or Requisition and Consignation, which is called an Order of Redemption. The User of this Order, must premonish the Wadletter to compear at the Time and Place appointed in the Reversion, to receive Payment of the Sums due to him, and take Instruments thereupon, called an Instrument of Premonition. If the Wadletter appear not, or refuse to accept, when duly offered at the Time and Place prefixed; it may be consigned under Form of Instrument in the Hands of the Person named for that effect in the Reversion, for whose Sufficiency the Consigner is not liable. If no Consigna-

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(a) Act 18. Parle 6. Jam. II.

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tary be named, the Money may be configned in the Hands of the Clerk of the Bills, upon the Wadfetter's Peril, or in the Hands of any other Perfon, on the Reverfer's Peril. Which Confignation exempts the Reverfer from being liable for Annualrent of the Sums configned. The Reverfer, after an Order used by himself or his Author, raises a Declarator of Redemption against the Wadsetter, wherein the Superior, if the Wadsetter was publickly inseft, should be cited, and if the Reversion be contained in the Wadset, may be decerned to inseft the Redeemer.

After Decreet of Declarator, the Lands redeemed belong to the Obtainer without new Infeftment, if the Wadfet was held of himself: But he must be inseft de novo if the Wadsetter was publickly inseft. The Wadsetter will get Letters of Horning upon the Instrument of Consignation and Reversion against the Con-

fignatary for getting up his Money.

The User of the Order of Redemption may pass from it any Time before Declarator, or before the Wadsetter hath owned the Consignation by Renunciation or Grant of Redemption of the Wadset, or by pursuing for the consigned Money: But after Declarator, or the Wadsetter's accepting the Consignation in Manner aforesaid, the User of the Order cannot pass from it.

The Sum for which a Wadlet was granted is still heritable before Declarator, or before the Wad-

Wadsetter hath owned the Consignation, and goes to his Heirs; but becomes moveable either by the Wadsetter's declaring his Acceptance of the Consignation, or by Declarator in his Lifetime. For Declarator obtained after his Death, doth not render the Sum moveable as to Executors of the Wadsetter, tho it be moveable as to the Representatives of his Heir, against whom the Declarator was obtained, and would pass to his Executors.

either of both Parties, or of the Wadsetter

only.

[1.] 'Tis voided by mutual Confent, when the Wadfetter renounceth it voluntarily upon receiving Payment from the Reverfer. Which Renunciation is term'd a voluntary Redemption, and must be recorded as Seisines within fixty Days after Date (a). A Wadset, upon which no Infeftment followed, is taken away by a simple Discharge or Renunciation. But if the Reverser be not infeft, nor Heir to a Person infeft in the Lands wadsetted, the Wadset must be conveyed to him by the Wadfetter. Where the Wadsetter is infest base, he must resign ad remanentiam in the Disponer's Hands, as his Superior. But if the Wadfetter publickly infeft, he must resign in favorem, in the Superior's Hands. Which Refignation, if the Reversion be ingrossed in the wadser Infestment granted by the Superior, doth reinstate the Granter of

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⁽a) Act 16. Parl. 22. Jam VI. junet. Act 11. Parl. 3. Ch. II.

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the Wadlet in his own Place as Vassal. But if the Reversion be not incorporated, the Granter of the Wadlet may charge the Superior upon his Letter of Regress, to infest him for re-establishing the Right in his Person: Or the Superior may, if he will, without a Charge reinfest the Granter of the Wadlet.

[2.] A Wadfet is extinguished by Consent of the Wadfetter only, when he requires Payment of his Money for which the Wadfet was granted. In this Requisition the same Solemnities are used, as in Premonition by the Reverser to the Wadsetter to take his Money. A Wadsetter may pass from his Requisition either directly by an express Declaration; or indirectly by meddling with the Rents of the wadset Lands for Terms subsequent, so be the Money is neither paid nor offered, and consigned, conform to the Requisition: But cannot pass from it, after an Offer and Consignation by the Reverser.

TIT. IL

Of Assignations.

A SSIGNATION in general, is a Conveyance of fome Thing personal or moveable from one to another.

Affignations are either ordinary or privileged.

SECT

SECT. I.

Of ordinary Assignations.

Deed, whereby Moveables, or some personal Right, or Right whereupon no Infestment solution on easier the Cedent, to another called the As-

figny or Cessionary.

2. No Right whereupon Infestment hath sollowed, can be conveyed by Assignation, except a Liferent Infestment, which resolves only in a temporary Right during the Cedent's Lifetime. And some personal Rights or Obligations are incommunicable by Assignation: As most Part of Reversions, temporary Tacks for Years, not set to one and his Assigns, Ge.

But all Moveables or Rights, whether heritable or moveable, not completed by Infestment, or which are perfect without Infestment, the current Prosits of heritable Rights completed by Infestment, Actions, Bonds conceived in favour of one, and his Heirs, without expressing Assignies, may be assigned. Yea, a Bond excluding Assignies, is assignable for one-rous and necessary Causes.

Right, till it be intimated to the Debtor, that

he may know whom to pay to.

Intimation may be made, r. By the Affigny, or his Procurators, shewing the Affignation

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Title

to the Debitor, and taking Instruments thereupon in the Hands of a Notary. 2. By a Purfuit at the Instance of the Assigny against him for Payment, wherein the Affignation is judicially produced, or by a Charge of Horning or Arrestment: But not by using Inhibition against the Cedent. 3. The Debtor's paying Annualrent, or any Part of the principal Sum, or acknowledging the Affignation, and promifing Payment to the Affigny, by any Writ under his Hand, is sustained as Intimation: But his private Knowledge of the Affignation is not lufficient.

4. An Affignation and Disposition to Moveables, or Affignation to Liferent Rights, Tacks, Rents, Oc. are perfected by Possession, without other Intimation; and Affignation to Re-

versions, by Registration.

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5. When an Affigny transfers or passes over his Right to a Third Party, that is call'd a Translation: And the restoring the Cedent to his former Right, is term'd a Retrocession, or Reposition. These Translations and Retrocesfions are perfected in the same Manner as Aslignations.

6. An Affignation to a Debt, carries all Diligence used for Payment or Security thereof, tho not express'd. An unintimated Affignation is of sufficient Force against the Cedent and his Representatives, and special Assignations not intimated in the Cedent's Life, are Titles of Action or Defence, without confirming

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fing the Subject, if no more complete Right stand in Competition (a). But an Assignation is effectual against singular Successors, only from the Date of the Intimation. And in a Competition, a second Assigny making first Intimation, is preferred to one whose Assignation is of

a prior Date (b).

7. All Exceptions upon Payment, Compenfation, &c. that lay against the Cedent before Intimation, are competent against the Affigny. And the Cedent's Oath doth, after Intimation, prove against a gratuitous Assigny; but not against an Affigny for an onerous Cause, unless the Matter was litigious by a depending Process, before the Assignation be intimated.

SECT. II.

Of privileged Assignations.

those, which require not to their Constitution and Perfection, the Solemnities essential to ordinary Assignations.

2. Such are divided into conventional and

legal Assignations.

3. Privileged conventional Affiguations, are the Indorsements of Bills of Exchange, and the Notes of any trading Company, which require not the Solemnities of ordinary Affiguations or other

⁽a) Act 26. Seff. 2. Parl. W. and M. (b) Vid. infr. Ch. II. Tit. 3. 5 7.

other Writs, and may be drawn blank in the Indorsee's Name, and Trusts in Relation thereto, may be proved otherwise than by Writ or Oath of Party (a). Nor is Intimation neces-

fary to complete them.

4. A legal Affignation is a tacite Conveyance by Law, established upon Equity, Expediency and prefumed Intention of Parties. Such is a Husband's jus mariti, the Courtefy of Scotland, a Widow's Terce, an Executor's Interest in the Goods and Gear of one deceased, an Arrestment with a Decreet of Forthcoming, Oc.

CHAP. II.

How Property may be affected, and carried away by the legal Diligence of Creditors.

HEN a Debton is unwilling to pay or perform what he stands obliged to, his Person may be attacked and incarcerated by raifing of Horning and Caption; his Moveables may be affected and carried off, either by Denunciation on the Horning, or by Arrestment and a Decreet of Forthcoming, or by Poinding; the free Disposal of his Heritage may be hindred by Inhibition, and the Heritage it felf may be evicted by Apprisings and Adjudications.

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(a) Act 25. Seff. 6. Parle K. W.

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TIT. L.

Of Horning and Denunciation.

is a Warrant in the King's Name, iffued out under the Signet, to charge Persons to pay, or perform Deeds, within a prefixed Time, upon pain of being declared Outlaw, and having his Goods poinded, &c. in case of Disobedience.

2. Letters of Horning are either general, or

special.

3. General Letters of Horning are those obtained upon a Bill to the Lords of Session, against Persons without a previous Citation; which are now allowed only for His Majesty's Revenue, for Ministers Stipends upon Decreets of Locality, and for making Decreets of poinding the Ground essectual (a); or where such Letters are warranted by particular Acts of Parliament.

4. Special or particular Letters of Horning are raised upon Decreets or Obligations registred in order to Execution, in the Books of Session or other competent Jurisdiction, that is, where the Debtor lives, which are Decreets in the Construction of Law. Some Obligations are registred in Virtue of a Consent to Registred

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⁽a) Act 13. Seff 2. Parl, W, and M.

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stration in the Body thereof; others are registrable by Statute, as protested Bills of Exchange.

charging the Party within the Kingdom perfonally, or at his dwelling Place, to pay or perform within 15 Days, if the Horning proceed on a Decreet, except a Decreet of Removing; or upon fix Days, if upon a protested Bill of Exchange, or Decreet of Removing; or within the Days contained in the Clause of Registration, where the Horning is founded on a registred Writ.

6. After elapfing of the Days of the Charge, the Party may for his Disobedience be denounced Rebel, i. e. Outlaw, by three Blasts of a Horn. Which Denunciation must be executed or served at the Market-cross of the Head Burgh of the Shire, Stewartry or Bailiary where the Party dwells (a).

7. Persons out of Scotland must be charged upon fixty Days, and denounced at the Market-cross of Edinburgh, Pier and Shore of Leith.

8. Horning and Executions must, within sifteen Days after Denunciation, be registred in the Books of the Jurisdiction where the Party dwells (b), or in the general Register of Edinburgh (c). Which disables the Party to sue or defend in Judgment, makes his single Escheat to fall from the Denunciation, and his Bb4

⁽a) Act 264. Parl. 15. Jam. VI. (b) Thid. junct. Act 75. Parl. 6. Jam. VI. (c) Act 13. Parl. 16. Jam. VI.

Liferent after continuing Year and Day at the Horn.

9. The Effect of Denunciation is taken off by Letters of Relaxation under the Signet. Which require the same Solemnities of Publication and Registration, as Denunciation. While the Party continues unrelaxed at the Horn, the next Step of personal Diligence, is to raise Letters of Caption.

TIT. IL

Of Caption:

a Warrant in the King's Name, under the Signet, for feizing the Debtor's Person, and committing him to prison. In this Execution of the Body, the Messenger having his Blazon on his Breast, toucheth the Party with his Rod or Wand, and reads to him the King's Letters, whereof he gives him a Copy signed by himself.

2. Caption may be put to Execution at any Time, whether in the Night or Day; and the Messenger may in Virtue thereof force open Doors. The Magistrates of the Bounds, when desired by the Messenger, are obliged to assist him in putting the Person attached in Prison: Against whom, for resusing their Concurrence, the Lords will, upon Sight of the Caption and the Messenger's Execution, issue forth Horn-

Ch. 2

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ing, vulgarly termed Letters of Second Caption. Thereupon, after expiring of the Days of the Charge, they may be denounced and registred at the Horn, and Caption obtained against them.

3. Subsidiary Action or Diligence for the Debt, lies against those who sail in durifully executing Captions: As against the Messenger, who wilfully suffers the Prisoner to escape out of his Custody; or those who made Way for his Escape, by deforcing the Messenger; or Magistrates refusing due Concurrence, when required to incarcerate the Prisoner, or letting him out of Prison without a just Cause (a). Nor will it exculpate Magistrates from answering for a Prisoner's Escape, that they apprehend and recommit him in as good Condition as before his getting off.

4. Besides such solemn Caption by the King's Letters proceeding upon registred Horning, there are other summary Attachments or Arrests of Persons allowed in Law, as, 1. Caption against Witnesses or Havers of Writs, called a second Diligence, which is granted upon the Sight of the first Diligence executed, without its being registred. 2. Caption is granted by the Lords of Session, upon special Occasions, as, 1. Against Debtors in meditatione sugar, justly suspected of a sudden fraudulent Design to run the Country with their Essets. 2. Against Contemners of their Authority, or Committers of some

⁽a) AA of Sederunt, 14 June 1671;

Tome Disorder in Business before the Session. 3. Against Advocates Servants, for keeping up Processes. 4. The Admiral has a Privilege to arrest or seize Persons summarly, till they find Caution judicio fisti, or judicatum solvi, or both. 5. By the Border Law, Inhabitants on either Side of the Border, are, upon Application to any Magistrate of the Bounds, arrested and incarcerated for any Debt till they find Caution to answer and pay. 6. Magistrates of Burghs Royal may arrest Strangers living without the Burgh, and found therein, at the Instance of a Burgels or other Inhabitant, for Horse or Man's Meat, Abuilziments or other Merchandize due to himself originally, without Bond or other Security (a). They are also privileged to iffue forth Acts of Warding.

5. Caption or Execution of the Body for civil Debt, is stopped, 1. By the Debtor's retiring to, and keeping within the Abbay of Holywood-house, which is a Sanctuary. 2. By his procuring Protection from the Parliament; his Creditors being cited to the granting thereof, and their Names and Designations therein set down (b): Or from the Lords of Session, Exchequer or Justiciary for compearing before them, upon Citation or Charge as a Witness; the Party citing him, first making Faith that he is a material Witness, and the Protection bearing the Cause for which it is granted (c).

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⁽a) Ad. 8. Parl. 2. Seff. 3. Ch. II. (b) Ad 22. Seff. 7. Parl. K. W. (c) Ad 9. Parl. 3. Ch. II.

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3. By a ceffio bonorum, which is a Debtor's yielding up by Disposition and Affignation, all his Estate real and personal to his Creditors, for getting his Body discharged of Imprisonment, which with us is done by an Action called actio bonorum; in this Action the Debtor cites all his Creditors upon fix Days, to accept from him upon Oath, a Right to his whole Means and Estate. If no Defence be made by the Creditors, or their Objections be repelled, the Pursuer's Oath is taken in the Terms of the Acts of Sederunt (a), upon the Disposition and Inventary of his Estate and Estects produced. Then a Decreet of bonorum is pronounced, containing a Warrant for a Charge to fet at Liberty. Which Decreet commonly ordains the Perfon who obtains it, to take on and wear the Dyvour Habit: And tis lawful to any Creditor to imprison him afterwards, if found wanting the Habit (b). Nor can the Bankrupt's wearing the Habit be dispensed with, unless in the Summons and Process of bonorum, his failing thro' Misfortune, be libelled, fustained and proven (c). 4. Where a Prisoner for civil Debt makes Faith before the Magistrate, that he is not able to maintain himself, if the Creditor at whose Instance the Debtor was committed or is detained Prisoner, refuse or delay within the Space of ten Days, to provide or give Security for Aliment to him, not under three

⁽a) 8 Feb 1688 and 18 July 1691. (b) A& of Sederunt, 23 January 1673. (c) A& 5. Self. 6, Parl. K. W.

three Shillings per diem after Intimation to the Creditor for that effect, the Magistrate may set the poor Prisoner at Liberty without Hazard (a), which is commonly called the Act of Grace. 5. Personal Attachment is hindred by a Suspension of the Charge (b).

TIT. III.

Of Arrestment.

RRESTMENT is an authoritative Order given to a Person in whose Hands another's moveable Goods are, discharging him to deliver or pay the same to the Owner, till some personal Debt, or Claim due by him to his Creditor Obtainer of the Arrestment (who is called the Arrester) be

paid or satisfied.

depending Action, that is, upon an executed Summons, called Arrestment upon a Dependence, or upon unregistred Bonds by virtue of Letters of Arrestment, or upon any Decreet or registred Bond by virtue of Letters of Horning containing Arrestment; and upon Decreets of inferior Courts, or Bonds registred in their Books by virtue of a Precept from the inferior Judge within whose Ferritory the Goods arrested are. Yea, within Burgh it is held sufficient for a common Town officer to arrest by

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⁽a) Act 32 Seff. 6. Parl. K. W. (b) Vid. Part 4. E. 2. Ch. 2. Tit. 1. Sect. 3.

the immediate verbal Warrant of a Magistrate, the Officer verifying his Execution upon Oath.

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Arrestment doth affect not Moveables, and moveable Bonds, which pass to Executors, but also heritable Sums due by Bond, whereupon no Infeftment followed, which last may be either arrested or adjuged, as the Creditor thinks fit (a). Arrestment of Annualrents, or Mails and Duties currente termino is effectual, if the Debtor they belong to be not denuded of his heritable Right by infefting another before the Term, and is preferable to a posterior Assignation to that Term's Rent. Which Arrestment while the Term is current, affects the whole Year's Rent, if payable but once in the Year, and only a Term's Rent if payable termly. Conditional Debts may also be arrested. Gratuitous or proper Aliments, Fees of a Commissioner to the Parliament, Pensions granted by the King, or the Salaries of his publick Ministers and Servants, are not arreltable, nor can a common Servant's Fee be arrested, except in so far as it exceeds what is necessary for his Aliment, according to the Quality of the Service he is in.

4. Arrestment hinders only the Person in whose Hand it is said on, (and not his Representative unless renewed in his Hand) to pay or persorm voluntarily to the Creditor whose Effects are arrested. For another of his Creditors may poind them, notwithstanning of a pri-

(a) Act (r. Parlig. Seff. 1. Ch. II.

prior Arrestment. And it affects only present Debts or Goods owing or belonging to the Arrester's Debtor, but is not extinguished by the Death of the Arrefter, or of the Owner of the Debts or Goods arrested. A Perfon in whose Hand Debts or Sums of Money are arrefted, cannot afterwards, unless the Arrestment be loosed, pay to his Creditor, or to his Heir or Executor, without being liable to repay to the Arrester. And if Goods arrested be delivered to the Owner, he against whom the Arrestment was ferved, is not only bound to make the Value forthcoming to the Arrefter, but also liable to the Pain of Breach of Arrestment; nor can he fafely pay or perform to one of the Owner's Creditors, without calling them all in an Action of Multiple-poinding to difpute their Interests.

Magistrate, is of Force only for the Space of 24 Hours. Arrestment upon a Dependence or unregistred Bond, may be loosed by Letters of Loosing Arrestment, which pass the Signet upon a common Bill and a Bond of Cautionry, obliging the Cautioner to pay the Debt arrested for, if found due by Law upon Trial (a). But Arrestment upon a Decreet or registred Bond, can be loosed or purged only by Payment, or Consignation of the Ground of the

Arrestment.

6. The Arrester to complete his Diligence, rais-

(a) Act 17. Parl 22. Jam. VI.

Ch. 2

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Person and person for much to him his Inbefore Debtoo out of

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Law of Scotland. Tit. 3. 31

raifeth an Action of Forthcoming against the Person in whose Hands he had arrested, to pay and perform to him the Subject arrested, at least fo much thereof as will fatisfy the Debt owing to him by the Owner, who must be cited for his Interest. If the Forthcoming be pursued before an inferior Judge, and the Arrefter's Debtor live within another Jurisdiction, or is out of Scotland, he must be cited by virtue of

Letters of Supplement.

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7. In a Competition of feveral Arresters among themselves, or with Assignies pretending Right to the Subject arrested, they are cateris paribus preferred according to the Dates of the Arrestments, and Intimations of the Affignations, tho' all in one Day, if one be three Hours prior to another. If all be upon one Day and some express the Hour, and others not, that which wants the Hour is prefumed to have been done the last Hour of such a Day; but if none of them mention the Hour, they are brought in pari pnfu. Yea, Arrestment of a Debt before the Term of Payment, or of a conditional Debt before the Condition exist, is preferred to a posterior Arrestment thereof after the Term, or after the Condition is come to pass. Where two Arresters, whose Grounds of Debt are of the same Kind, are not equal in Diligence, the Obtainer of the first Decreet of Forthcomming, as having the first complete Diligence, is preferred: But where feveral Persons arrest upon Claims of different Kinds, he

who arrests upon a Decreet, is preserred to a prior Arrester upon a depending Action, whose Debt is not constituted by a Decreet against the common Debtor at the Time of the Competition: And an Arrester for a Debt, whereof the Term of Payment is come, is preserred to one who before arrested currente termino.

TIT. IV.

Of Poinding.

1. POINDING is the distraining of one's moveable Goods, by Authority of Law, for his Debts.

2. Poinding is of three Kinds, viz. personal,

real, and poinding brevi manu.

3. Personal Poinding is distraining for personal Debt, by virtue of Letters of Poinding, or Horning and Poinding, rais'd upon a Decreet or registrated Bond, and executed by Messengers at Arms, or by virtue of the Decreet or Precept of an inserior Judge, executed by the Officers of Court, the Days of the Charge to pay being first expired (a).

4. Poinding must be executed with Up-

fun.

5. When a Messenger or other going to poind, is hindred by the Doors being shut against him, the Creditor, upon Application to the Lords, and producing the Warrant of Poind

(a) A& 4. Parl. 2. Seff. 1. Ch. II.

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Poinding, with the Messenger or Officer's Execution, bearing that Access was denied, will get Letters of open Doors.

not actually at Work at the Time) when there are other Goods on the Ground, (sufficient to pay the Debt) cannot be poinded (a). By Labouring, is understood the ordinary Season of cultivating and sowing the Ground, in Expectation of Increase in such a Place of the Country; or when one is actually labouring his Ground, tho the Labouring be then over in the rest of the Neighbourhood: But such Beasts belonging to a Debtor, may be poinded after his Labouring is over, tho most of the Labouring in that Place be not ended.

7. If Persons compear, and offer to make Faith before a Poinding is completed, that such Goods belong to them, and what way they belong, the Executor cannot proceed. But when no Person pretends to the Goods, they are apprised upon the Ground, to the Value of the Debt and the Sheriss-see, or so far as they will extend, if of less Value than the Debt, and offered to the Debtor for the Sum they are valued at: If he don't appear, or don't offer to redeem them, they are apprised again, at the Market-cross of the head Burgh of the Jurisdiction, where the Poinding is executed, and offered to the Debtor upon Payament

(a) A& 98, Parl. 6. Jam. 1V.

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ment of the Debt and Sheriff-fee; and if neither he nor any in his Name accept the Offer, are delivered to the Poinder, in Satisfacti-

on of his Debt, in Whole or in Part.

8. Real Poinding is the diffraining of Moveables upon the Ground of the Debtor's Lands, by a Messenger, for Payment of some real Debt, as bygone Feu-duties, non-entry Duties, or the Avail of Marriage declared, or the Bygonesof an Infestment of Annualrent, &c. by virtue of Letters of poinding the Ground, issued forth upon a Decreet of poinding the Ground. In which Decreet the Lords use, where there is a Competition of Creditors, for the Benefit and Ease of poor Labourers of the Ground, either to assign to each Creditor a particular Locality, conform to his Sum and Preference, out of which he may feek Payment termly, or to allow some Time to every one of them, according to his Preference, for poinding the Moveables upon the Ground.

9. This Poinding for real Debts, differs from personal Poinding, in that, 1. The Debtor's Tenants cannot be distressed by the latter, but may be distressed by the former, currente termino, for the Value of a Year's Rent, when they pay their Master once in the Year, or for a Term's Rent, when they pay termly. 2. Personal Poinding requires a preceeding Charge to pay, which is not necessary to a Poinding of the Ground, tho it cannot proceed

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Labouring Beasts, in labouring Time, may be carried off in a personal Poinding, if there be no other Goods on the Ground, but not in a real Poinding, whether there be other Goods or not. 4. A Decreet of Poinding for personal Debt, must be transferred against the Debtor's Representatives; whereas a Decreet of poinding the Ground, needs no such Transference, and is effectual against all Successors and Possessors, without any new, Constitution against them.

be executed without a previous Sentence of a Judge; which is thus far allowed, that a Perfon who finds another Man's Beasts doing Hurt or Damage upon his Ground, may detain them till he get Satisfaction from the Owner, of Half a Merk toties quoties, for each Beast found in the Skaith, besides the Damages, and

his Expences in keeping it (a).

TITLE V.

Of Inhibition.

I. INHIBITION is either of Lands and other heritable Rights, or of Tithes?

2. Inhibition of Lands and other heritable Rights, is a personal Prohibition, by virtue of

Act II. Seff. 2. Parl. Jam. VIII

Letters under the Signet, obtained upon a common Bill, by any Creditor real or perfonal discharging his Debtor to sell or dispose of, or any ways burden his Lands or heritable Rights completed by Insestment, to the Prejudice of the Creditor's Claim or Debt due to him, till the same be satisfied.

3. Inhibition may be obtained upon any obligatory Writ, or upon a depending Action, or upon a general Charge to enter Heir, in so far as concerns Debts particularly libelled in

the general Charge.

4. It must be published and served by a Messenger, 1. Against the Person inhibited, if within Scotland, personally or at his dwelling Place; and if out of the Country, at the Market-cross of Edinburgh, Pier and Shore of Leith. 2. It must be executed at the Market-cross of the head Burgh of the Shire, Stewartry or Regality where he dwells (a), by crying of Three several Oyesses, publick Reading of the Letters, and leaving or affixing a Copy of the same at the Market-cross. The Letters and Executions thereof, must, within Forty Days after Publication at the head Burgh of the Jurifd ction where the inhibited Party dwells, be entred either in the particular Register of that District, and also where his Lands ly, (if these and his dwelling Place be within different Jurisdictions) or in the general Register at Edinburgh (b), otherwise it is null. Registration in

(a) Act 264. Parl. 15 Jam. VI. (b) Act 119. Parl. 7. junct. Act 264. Parl. 15. and Act 13. Parl 16. Jam. VI.

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the general Register affects all his Lands within Scotland: But Registration in the particular Register, affects no Lands without that Jurisdiction.

5. Inhibition takes Effect only against Lands, or heritable Rights by Infeftment, or Rights equivalent, as Liferents by Courtely, Terce, or Refervation in Infeftments granted to others, and the Cafualties of Superiority; but affects not only fuch belonging to the inhibited Person at the Time, but also those to be acquired by him, any where within Scotland, if the Inhibition be recorded in the general Register, or within the Jurisdiction where it is recorded, if it be entred only in a particular Register. It extends not only to polterior voluntary Infettments of these, but even to Infestments upon Apprifing or Adjudication, if the Debts which are the Foundation thereof, be posterior to Publication of the Inhibition; but is not etagainst posterior voluntary Rights, which the Person inhibited stood obliged to grant, before Inhibition was served, nor against posterior legal Diligence of Apprising or Adjudication, for Debts anterior to the Inhi-If a Creditor of the Liferenter or Wadfetter, intimate, by way of Instrument, to the Reverser, that the Wadsetter or Liferenter stands inhibited at his Instance, the Wadfet or Annualrent can only be redeemed by way of Action of Declarator, to which the Inhibiter is cited, or by Suspension of double Cc3

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Poinding, upon Confignation of the Money for which the redeemable Right was made (a). Inhibition hath no Effect against Rights granted by the inhibited Person's Heir.

6. The Action arising upon Inhibition, is called Reduction ex capite inhibitionis, whereby Deeds contrary thereto may be rescinded and anulled, in so far as prejudicial to the Ground of the Inhibition, and till that be satisfied.

7. Inhibition of Tithes, is a Prohibition given at the Instance of a Titular of Tithes, to a Person formerly in Use to intromit therewith, not to do so in Time coming, under the Pain of being liable in a Spulie, which may be executed upon a common Precept from the Commissary, by any Person as Sheriff in that Part, and needs not to be registred.

I proceed to shew how Heritage may be e-

victed by Apprifing or Adjudication.

TIT. VI.

Of Apprifings and Adjudications.

A PPRISING is a Decreet or Sentence of a Messenger at Arms, adjudging a Person's Lands, Hereditaments, or any heritable Right, to belong to his Creditor, who is called Appriser, in Payment of a liquid and clear Debt, moveable or heritable by Destination, if payable without Requisiti-

(a) Act of Sed. 19 Feb. 1680.

on, and constituted by a Decreet without Infestment, or constituted by Infestment, and rendred moveable by a Charge, which the Debtor obstinately refuses to pay, or cannot pay. Which Messenger is made Judge, as Sherist in that Part, in place of the Sheriff of the Shire, whose Office it was in old Time to apprise

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2. Adjudication is a Decreet of the Lords of Seffion, adjudging and appropriating a Perfon's Lands, Hereditaments, or any heritable Right, to belong to his Creditor, who is called the Adjudger, for Payment or Performance. Of which there are feveral Sorts, as 1. Adjudication of the Estate of a living Person, reputed folvent, for Payment of a clear and liquid Debt, which is now come in place of Appri-2. Adjudication of the Estate of a Perfings. fon deceast. 3. Adjudication in Implement. 4. Adjudication and Sale of a Bankrupt's Estate.

SECT. I.

Of Apprifing, and Adjudication come in place thereof.

SEEING Creditors for liquid Debts must now, inflead of Apprifing, get the Estates of their Debtors adjudged to them by Decreets of the Lords of Seffion, unless they have formerly apprifed them, in which Cafe they may either,

⁽a) Ad 37. Parl. 5. Jam. HI.

either again apprise or adjudge, as they think fit (a). I propose to treat of Apprising and Adjudication now come in place thereof, first separately, in so far as they differ; and then joyntly, in what Things they agree.

Of Apprising.

1. For preventing needless Expence by many Apprisings, where the Debtor's Lands ly scattered in many Jurisdictions, the Lords direct Letters of Apprising under the Signet, to Messengers, as Sheriffs in that Part, containing ordinarily a Dispensation to sit at Edinburgh, whether in Session or Vacation Time. The Messenger, after Search first for Moveables in the Debtor's House, and upon the Ground of the Lands, and none, or not fo many found as would satisfie the Debt, denounceth the Lands to be apprifed such a Day upon the Ground, and at the Market-cross of the head Burgh of the Shire, Stewartry or Regality where they ly, and cites the Debtor personally, or at his dwelling Place upon 15 Days, if within Scotland, or at the Cross of Edinburgh, and Pier of Leith, upon 60 Days, if he be abroad, to compear before him that Day. Upon the Day appointed, the Messenger, as Judge, creates and swears the Members of Court, the Debtor is thrice called, and not appearing, the Matter is referr'd to an Inquest of 15 sworn Men. Who, having

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⁽a) Act 19. Parl 2. Seff 3. Ch II.

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having chosen one of their Number to be their Chancellor, if the Plurality of them find the Pursuer's Claim instructed, do, by their Verdict, apprise the Lands, Oc. and ordain him, his Heirs or Affignies, to be infeft for Payment to them of the accumulate Sum of Principal, Annualrent and Expences owing, and of a Sum corresponding thereto for the Messenger's Pains, called the Sheriff-fee. Whereupon the Purfuer or his Procurator takes Instruments. Then the Lands are thrice offered at the Door to the Debter for the Money; and upon his not appearing to pay, the Messenger interposes his Authority to the Verdict of the Inquest, which is called a Decreet of Appriling.

2. The Lords of Session must allow this Decreet, by figning an Abbreviate thereof, which ordains Horning to pals, for charging the Superior to enter and infeft the Apprifer: And the Allowance must be recorded in the Bill Chamber, within 60 Days after Date of the Decreet of Appriling, otherwise another Appriling, tho of a posterior Date, allowed and recorded before it, will be preferr'd (a), unless Infeftment follow upon it, before the First allowed Apprifing become effectual by Infeft-

ment, or charging the Superior.

3. An Appriling is redeemable by the Debtor, or a posterior Apprifer, or by the Superior within Ten Years (b), from the Date of

⁽a) Act 31. Parl 1. Seff 1. Ch. II. (b) Act 62. Parl. 1. Sell 1. Ch. 11.

the Decreet. And expired Apprisings acquired by the Debtor's apparent Heirs or Confidents to their behoof, are redeemable by any posterior Appriser, within Ten Years from the Time of the Infestment, or Publication of the Right by Process (a).

Of Adjudication come in place of Apprifing.

1. Upon a Summons of Adjudication, according to Circumstances, either a special or a general Decreet of Adjudication may be pronounced.

2. A special Adjudication is, when the Debtor appears upon the Summons, and takes a Day to produce a clear Progress of Rights to a Part of his Estate, equal in Value to the principal Sum and Annualrents resting, and a Fifth Part more; because the Creditor is force to take Land for his Money, besides the Composition due to the Superior, and the Expence of the Process and Infestment, without any Consideration of the Penalty in the Debtor's Bond, or other Writ, which is the Ground of the Process; and to deliver the same, or Transumpts thereof to the Creditor purluing, and renounce the Possession of the said Proportion of the Estate in his favour. Upon which an Act is extracted; and if at the Calling thereof, after expiring of the Term taken, a Progress be produced, the Value of the Subject

(a) Ad'62, Parl 1, Seff I, Ch. II.

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ubject yest to be adjudg'd, must be prov'd, and what Warrandice of it the Debtor shall give to the Creditor, determined. Which Subject the Lords adjudge to the Creditor by their Sentence, called a Decreet of Adjudication. By virtue of this Decreet, the Adjudger may immediately enter to Possession, and enjoy the Rents for his Annualrent during the not Redemption, without being liable to Count and Reckoning. But he cannot, after he hath attained Possession, use personal Execution against his Debtor by Horning, Caption, Arrestment, or otherwise (a).

3. A general Adjudication is, when upon the Debtor's not appearing in the Process of Adjudication, or upon his failing to produce a Progress, and renounce, after his taking a Day for that Effect, the Pursuer gets the Debtor's whole Estate adjudged to him, as it might have formerly been apprised (b), for Payment of the accumulate Sum of Principal, Annualrent and conventional Penalty, if any be, without any Fifth Part more. For if, in such a Case, a Fifth more be adjudged for, the Adjudication is void and null (c).

4. A Factor upon a bankrupt Estate may raise Summons, and obtain Decreet of Adjudication at the Expence of the Estate in his own Name, to the behoof of all Creditors giving their Instructions of Debt to the Clerk of the

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⁽a) Act 19. Parl. 2. Seff. 3. Ch. IL (b) Ibid. (c) Act of Sed. 26 Feb. 1684.

Process, within 40 Days after Sequestration, with this Declaration figned by each of them, that he gives his Documents of Debt, to the end the Factor may adjudge for him; and may, at the Defire of Creditors failing to give in their Instructions within the 40 Days, or at least before raising the Summons for adjudging, adjudge a fecond Time in his own Name for their behoof, upon their own Expences. And all Creditors may adjudge from Time to Time in their own, or in the Factor's Name, as they think fit, till the Ranking be concluded. These Creditors, for whom Adjudication is so obtained in the Factor's Name, have the same Benefit thereof, as if they had adjudged by themselves, upon their respective Grounds of Debt; or were retrocessed by the Factor (a).

5. The Lords allow all imaginable Dispatch to the Pursuers of Adjudication. Where Compearance is made for the Debtor, and there is no former Adjudication of his Estate, the Process is to be seen and returned, and must go to the long Roll of ordinary Actions for the Outer-house. At the Calling whereof before the Ordinary, if no Objection be made against the Debt, and the Desender offer to produce a Progress, a Day is assigned to him for that End. And if no such Offer be made, Decreet of Adjudication is instantly pronounced, adjudging the Desender's whole heritable Estate libelled, to belong to the Pursuers. But it it

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⁽a) Act of Sederuut, 23 November, 1711. \$ 2.

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be notourly known or instructed, that there is a former Adjudication, already past against the Defender's Estate, all posterior Adjudications come in fummarly by the Regulation Roll, and pass of Course, reserving all Defences contra executionem, that they may be within Year and Day thereof, and come in pari passu with the first Adjudger. Decreet of Adjudication being pronounced, one, two, or more Abbreviates, or thort Abstracts of the Decreet of Adjudication, as the Adjudger defires, are made and figned by the Judge at the same Time that he signs the Decreet. One of which Abbreviates must be recorded in the Bill-chamber within fixty Days of the Date, and be retained by the Clerk of the Bills, as a Warrant for any posterior Extract thereof (a). One Abbreviate may, if the Party defire, be written and figned on the Back of the Decreet at any Time within twice fixty Days after pronouncing thereof (b).

by the Debtor or a posterior Adjudger, or by the Superior, within five Years from the Date; and general Adjudications within ten. And expired Adjudications acquired by the Debtor's apparent Heirs, or Confidents to their behoof, are redeemable by any posterior Adjudger, within so many Years from the Insestment, or the Time that such Acquisition became pub-

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⁽a) Act of Regul. 1695. § 24. junct. Act of Seder. 18 January, 1715. (b) Act of Regul. 1696. § 4

In what Things Such Apprifings and Adjudications agree.

on upon a Summons of Adjudication, render the Subject to be apprifed or adjudged, litigious, and hinders the Debtor to grant voluntary Rights thereof, to the Prejudice of the Apprifer or Adjudger, and the Superior or Adjudger is in the same Case after Citation in the Process of Adjudication, as if Apprising were led, and a Charge given thereon (a).

2. A Decreet of Apprising or Adjudication, carries all Right to the Lands or others apprifed or adjudged, that a voluntary Disposition would import, and hath the Effect of an Assignation to any Right thereof, not requiring Infestment to complete it, as liferent Tacks, Reversions, &c. without Necessity of Intimation. It intitles to the Mails and Duties of all subsequent Terms, and excludes prior Assignations or posterior Arrestments thereof, for perfonal Debts.

3. Some Apprisings or Adjudications are complete Rights without Infeftment, as, 1. Apprisings or Adjudications of heritable Bonds, heritable Offices, Contracts of Wadset, and the like, whereupon no Infestment had followed, or needed to be taken. 2. Posterior Apprisings or Adjudications, within Year and Day

(c) Act 19. Parl. 2. Seff. 3. Ch. II.

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of former, completed by Infeftment, or a Charge against the Superior. 3. An Apprising or Adjudication at the Instance of a Superior of his Vassal's Lands, is complete by a Declarator of Confolidation, in which Case his old Infeftment sufficeth: Tho' a Superior may, for the more Security, infeft himfelf upon the Apprising or Adjudication, or procure Precepts out of the Chancery to infeft him. Apprifings on Adjudications require to be perfected by Infestment. Upon which, if the Lands hold of the Sovereign, Charter and Seifine under the great Seal, is obtained in the fame Manner as upon a Disposition, by passing and compounding a Signature of Apprifing or Adjudication in the Exchequer, and getting Precepts thereon, under the Signer and privy Seal. But if the Superior be a Subject, the Apprifer or Adjudger uses to charge him with Horning to infeft him: And is thereby preferable to posterior voluntary Infestments, obtained thro' Collusion with the Superior or common Debtor. No Composition is due by Appriler or Adjudger of burgage Lands, to the Magistrates of the Burgh. But an Apprifer or Adjudger of country Lands, must offer to the Superior charged, a Charter to be figned, and a full Year's Rent of the Subject apprifed (a) or adjudged (b), whom the Superior ought to receive, without obliging him to instruct his Author's

⁽a) Act 37. Parl. 4. Jam. III. Act 6. Parl. 23. Jam. VI. (b) Act 19. Parl 2. Seff. 3. Ch. ff.

thor's Right: Albeit the Superior have a Pretence to the Property, or an Interest to poind the Ground for bygone Feu-duties resting to him. A Superior is obliged to receive all Apprifers or Adjudgers who charge him: gets only one Year's Rent for all of them. The Superior, after he is charged, and has got a Year's Rent offered to him, can no longer reap any Casualty thro' the Death or Deed of the Vaffal apprifed or adjudged from. The Superior who is charged, may redeem the Apprifing or Adjudication, and retain the Land to himself, if content to pay the Debt apprised for (a), not exceeding the Worth of the Lands, and where it doth exceed, to pay the Value of the Lands. In which Case the Appriser or Adjudger, must transfer his Right and Debt to the Superior, with absolute Warrandice for the Sum received; referving to himself, Action against the common Debtor, in so far as the Debt is not fatisfied by the Superior. But the Superior is cut off from this Option, to take the Land to himself, after he hath accepted Payment of a Year's Rent.

4. In a Competition of Apprifers and Adjudgers, he who first chargeth the Superior to enter and insest him, is preserved to a posterior Charger first insest by the Superior's Partiality. And Apprisings or Adjudications, within Year and Day of the Decreet of Apprising or Adjudication first effectual by Insestment,

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or a Charge against the Superior, come in paripassu, equally, as if all were but one Apprising or Adjudication. Which posterior Apprisers or Adjudgers, in that Case, must pay to the first estectual one, all Expences of his Diligence and Insestment, or Charge (a). But of Apprisings or Adjudications for real Debts, as bygone Annualrents, due by Insestment, Feuduties, &c. are carried back ad suam causam, and preferred according to the Date of the real Right (b).

5. Apprifings or Adjudications once effectual, may be extinguished by the Debtor, or by posterior Apprisers or Adjudgers, or the Superior using an Order of Redemption, within the respective Terms of Years allowed for that End, upon Payment of the Sums therein, and of a Year's Rent, in Name of Composition due to the Superior, tho' he out of personal respect entred the Apprifer or Adjudger gratis, and the Annualrent of the accumulate Sums from the Dates of the Decreets (c), or a posterior Apprifer redeeming expired Apprifings or Adjudications, acquired by the Debtor's apparent Heir or his Confident, within fo many Years from the Date of the Infeftment, or Time when the Acquisition was published, by some legal Demand, upon Payment of the Sums truly paid out for the same, or the Sums in the Apprifing or Adjudication, if acquired gratis

⁽a) Act 62. Parl. r. Seff. r. Ch. II. (b) Ibid. (c) Act 6. Parl. 23 Jam. VI.

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gratis (a), at least what is resting thereof. But there is less Occasion for such Redemption from apparent Heirs now, when the purchasing any Right to their Predecessors Estate, otherwise than fairly at a publick Roup, makes them liable as Heirs served (b). This temporary Power of Redemption, is called a legal Reverfion; and the Person to whom it is competent, is called the Reverser. Which Legal doth not run against Minors. For a Minor against whom an Apprifing or Adjudication is obtained, or having Right to the Reversion of it, may redeem at any Time before he is 25 Years of Age. A Major succeeding to a Minor, against whom the Legal of an Apprising is expired, hath Year and Day to redeem; and succeeding to a Minor, while the Legal is current, may redeem at any Time before Expiration thereof (c). 2. Apprifings for Adjudications, are extinguished within the Legal, by the Creditor's Intromission with the Rents. For tho' special Adjudgers enjoy these in lieu of their Annualrents; yet Apprisings and general Adjudications, are extinguished by the Creditor's uplifting Mails and Duties to the Extent of all that is due to him.

6. But if no Order of Redemption be used by the Reverser within the Legal, or against the Debtor's apparent Heir, acquiring an expired Apprising or Adjudication, within the

⁽a) Act 62. Parl. 1. Seff. 1. Ch. II. (b) Act 24. Seff. 5. Parl. W. and M. (c) Act 6. Parl. 23. Jam. VI.

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limited Time after his Right became publick, which may be term'd the second Legal; or if any Part of the Sums apprised or adjudged for, remain unpaid, after expiring of these Legals, after the Minor Reverser's passing the Age of 25 Years, the whole Subject apprised or adjudged, belongs irredeemably to the Appriser or Adjudger, without Consideration of what he intromitted with.

SECT. II.

Concerning Adjudication of the Estate of one de-

remaining without a Master, by his apparent Heir's being in Doubt, whether to accept or renounce it, called hereditas jacens, may be adjudged, upon the apparent Heir's renouncing the Inheritance, when charged to enter upon it, either for the Debt of the deceased, or for the apparent Heir's proper Debt (a).

2. If the Pursuer's Debt against the deceased be not constituted, and want to be proved, the apparent Heir renouncing, is called, for Form's sake, to supply the Place of a Desender, and a Decreet cognitionis causa, for constituting the Debt, passeth without any Essect against him. Thereupon the Obtainer raiseth Adjudication, wherein the said apparent Heir D d 2 is

(a) Act 7. Parl, 23. Jam. VI.

is also called to personate a Defender, but can make no Defence; and the Lords adjudge the whole Heritage of the deceased Debtor, and all Benefit the apparent Heir might have had by entring to him. Where one pursues against an apparent Heir, Constitution of a liquid Debt instantly verified by Writ, and the Defender renounceth, the Pursuer may in the same Process, crave Adjudication hereditatis jacentis, without any other Decreet cognitionis causa.

3. Adjudication on the apparent Heir's Renunciation, may be pursued, not only before the Session, but also before inferior Courts: And all within Year and Day of the First effectual Adjudication, come in pari passu.

4. Such Adjudications may be redeemed within Ten Years by a Creditor, either of the Heir deceased, or of the apparent Heir adjudg-

ing afterwards (a).

5. If an apparent Heir, charg'd to enter Heir, don't renounce, he must be charged to enter Heir in special, before the Estate of the deceased can be adjudged for his Debt.

SECT. III.

Of Adjudication in Implement.

1. FOR making Dispositions or Obligements to inseft, effectual, the Receiver may get the

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⁽a) Ibid. junct. Act 62. Parl. I. Seff. I. Ch. II.

the Subject disponed, adjudged to him, by the Lords of Session, and the Superior decerned to receive him. Which is called an Adjudication

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2. This differs from an Adjudication for Debt in several Things. 1. An Adjudger in Implement, comes not in pari passu with other Adjudgers, of that or any other Kind. 2. The Superior is not obliged to receive him, till he instruct the Title of the Person adjudged from.

3. Adjudication in Implement passeth against an apparent Heir, without a Charge to enter, or Renunciation. 4. It extends only to the Thing disponed, and hath no legal Reversion.

5. It becomes not effectual by a Charge against the Superior; Tho such a Charge would exclude posterior voluntary Rights.

SECT. IV.

'Adjudication and Sale of a Bankrupt's Estate.

and his Estate posses'd by Creditors, any Creditor having a real Right, may raise a Summons of Sale, either relative to a Ranking of the Creditors, or containing a Ranking with a Reduction and Improbation, to oblige all the Creditors to produce their Interests. But a Ranking and Sale are commonly now rais'dn one Summons. Upon which the Debtor and all his real Creditors, in the actual Possession of

which the Citations are given, otherwise they make no Faith in Judgment (a).

2. At the first Calling of such Summons, the Ordinary assigns a Day for the Creditors to produce their Rights and Interests, and names the Lord who falls to be Ordinary, to rank them (b), and assigns the same Day to the Pursuer, for proving the Right to the Tithes, and for proving the ordinary Rate or Price of Lands of such Holding, and Casualties in the Shire where they ly. A Commission, if desired, will be granted, for proving the Rental, by Tenants in the Country, but not for proving the Value of the Lands, which can be proved only by neighbouring Heritors and Gentlemen, before the Lords.

3. The Ordinary of the Ranking proceeds, advises, and determines therein, as is set forth

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⁽a) Act of Sederunt, 23 November 1711. 5 1. (b) Ibid.

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in another Place (a). Mean time, Proof of the Bankrupcy, Rental, Value, and other Points of the Sale goes on. When that is concluded, and Avilandum made therewith, upon a Bill to the Lords, a Day is appointed for advising it, and a Remit made to the Ordinary on concluded Causes, for preparing a State thereof. A prepared State, and a separate Scheme on a Paper apart, for pointing at the Proof briefly, being approved, and marked by the said Ordinary, the Cause is called at the appointed Day, or by the President's Hand-roll, and advised.

4. The Creditors being ranked, and the common Debtor found to be bankrupt, the Lords ordain the Estate to be exposed to Sale by publick Roup, on a precise Day, at such an Hour, within the Seffion-house, at such a Price as the lowest; and appoint Two of their own Number, or either of them, to overfee the Roup, with Power to adjourn the same, as it is thought convenient, and to prefer the highest Offerer. They direct also Letters of Publication to be iffued out under the Signet, (which are figned by one of the principal Clerks) for Intimation of the Lands and others to be exposed to Sale, the Lords Price, the Time and Place of the Roup, to the real-Creditors in Possession, personally or at their dwelling Place, upon Twenty one Days, if within Scotland, and at the Market-cross of Edin-D d 4

⁽a) Vid. infr. Part 4. B. 2. Chap. 2. Tit. 1. 5 8.

Edinburgh, Pier and Shore of Leith, upon Sixty Days, if forth thereof; and against all other Persons concerned, at the Market-cross of the Shire, Stewartry or Regality, and at the Doors of the Parish-church where the Lands ly, and at Six other adjacent Parish-churches, named by the Lords, on Sunday, at the dissolving of the Congregation, after the Forenoon's Sermon, and at the Market-cross of Edinburgh, and Pier of Leith, upon Sixty Days, Copies of which Letters of Intimation, are to be affixed on all the Places aforesaid (a).

must be instructed that the Decreet of Ranking is extracted: Then the Conditions of the Roup are concerted. The highest Bidder, not under the Lords Price, is preferred, signs his Offer immediately, and finds Caution within a Fortnight, for Payment of the Price to the Creditors, as ranked. The Roup being reported to the Lords in Presence, they interpose their Authority, and pronounce their Decreet of Sale, adjudging the Estate sold to the Purchaser for the Price. Upon which Decreet Insestment passeth, as upon other Adjudications.

6. Where no Buyer is found, Law (b) allows the Lords to divide the Estate among the Creditors, according to their several Rights and Diligences, and to determine the Value of Liferent-escheats affecting the same; but such a Division among Creditors being very diffi-

(4) Act 17. Parl. 3. Ch. II. (4) Act 20. Seff. 2. Parl. W.& M.

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difficult, the Lords do sometimes, upon their Application, lower the Price set upon the E-state, for encouraging Persons to buy, and appoint a second Roup.

CHAP. III.

Of Confiscation.

ONFISCATION is a Right which the King acquires to the E-ftate or Goods of his Subject.

Property comes to be confiscated upon several Grounds, as 1. For high Treason. 2. For Jesser Crimes, and by Outlawry. 3. For Want of a lawful Successor to the Owner. 4. Because occupied and claim'd by no Body.

I. Confiscation for high Treason is called Forseiture, which deprives those who have incurred it, of all their real and personal Estate, Goods and Gear whatsoever. This, by Laws before the Year 1690. did not only carry away Rights and Interests vested in the Traitor, but also those of his or her Wise or Husband, Vasallis, Creditors, and Heirs of Entail; but by a milder Law then made (a), such Rights and Interests of the Traitor's Wise or Husband, Vassals, Creditors, and Heirs of Entail, fairly and justly acquired, were salv'd. And now since the Union, where any Person married and

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⁽a) Act 33. Seffe 2. Parl. W. & M.

and seised before the First of July 1709, of any Messuages, Lands, Seigniories, Rents, Tenements, or Hereditaments in Scotland, of an Estate, Tail or Tailie, affected with irritant and resolutive or prohibitory Clauses, committing high Treason, while he hath Issue of that Marriage living, or a Possibility of such Issue, forseits, upon his Attainder, the said Messuages, Lands, Seigniories, Tenements, and Hereditaments, during his own Life only, without Prejudice to the Issue and Heirs of Intail of the said Marriage to inherit the same. And after Decease of the Pretender, no Attainder for high Treason shall disinherit any Heir,

Person, than the Offender during his natural Life (a).

2. Confiscation for lesser Crimes, or by Outlawry, is called single Escheat, which is spoke of already (b).

nor prejudice the Right or Title of any other

3. Confiscation of Property, for want of a lawful Successor to the Owner, is of Two Sorts, viz. ultimus heres, and Bastardy.

[1.] Ultimus heres, is a Right by which the King succeeds as last Heir, or rather for want of an Heir, to any whose Stock of Kindred is spent; so as no Person can claim Contingency of Blood to him. Which is effectual by Declarator of ultimus heres, at the Instance of the King, or one claiming under his Majesty by Gift

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⁽a) 7 A. Ch. 21. vid. 1 G. Ch. 20. (b) Supra Part 2. B. 2. Ch. 3. Tit. 2, Sect. 3.

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Gift, proceeding upon a Citation of all and fundry, at the Market-cross of the Shire where the Person deceased dwelt. But if he hath a Widow surviving him, she must be particularly cited; and any pretending to be of his Kindred, will be allowed to defend in this Process for his Intetest.

[2.] Bastardy is a Right the King hath to succeed to the Estate, real and personal, of a Bastard dying without Issue of his own Body. Which is also estectual by a Declarator at the Instance of the King or his Donatary, upon a general Citation at the Market-cross, in the same Way as ultimus heres: Wherein any Person concern'd may appear and defend. The proper Exception against this Process is, That the Person pretended to be a Bastard, was begotten of Parents lawfully married, at least who lived as Man and Wise; or at least were held and reputed such at the Dissolution of the Marriage; or that he was legitimated by the King before the Gift of Bastardy.

[3.] Both these Casualties of ultimus beres, and Bastardy, are excluded by a Disposition made by the deceased, of his Estate, in savour of any Person; and when due, are burden'd with his Debts so far as the Estate goes. Which Estate the Creditors may affect and carry away by proper Diligence; and the Bastard's Husband or Wife surviving, may claim their legal Interest in it: Provided the Officers of State and Donatary, if any be, is ci-

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ted for their Interest. When Lands holden of a Subject, fall to the King by Forfeiture, Bastardy, or ultimus heres, his Majesty, who cannot hold of another Superior, doth, by a Letter of Presentation, nominate a Donatary to that Superior, to be his Vassal in place of the former.

4. Goods confiscated, because occupied or claim'd by no Body, are Waifs, Strays and Wreck.

[1.] Waifs are vacant Goods, which no Perfon owns.

[2.] Strays are wandring Cattle, or tame Beasts which have strayed from their Masters. Waifs and Strays must be proclaim'd, in order to find out the Owners, who, upon instructing such Things to be theirs, recover them, they paying the Expence of keeping, and other incident Charges. But such Waifs and Strays, if no Person appear, after a certain Time, to challenge and claim them, belong as Escheat to the King, or to others by Grant from his Majesty.

[3.] Wreck are Things lost by Shipwreck at Sea, and cast on the Shore, concerning which our Law provided, That Ships broken in Scotland, should be confiscated, if they belong d to a Country that used such hard Law to our distress'd Vessels, and such Ships of other Places should meet with the same Favour here, as is shewed to ours with them (a). But now

(a) Act 124. Parl. 9. Jam. I.

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the Law is, that Goods lost in this calamitous Manner out of Ships forc'd on Shore, or stranded upon the Coasts of Britain, or any other of his Majesty's Dominions, may be recovered by the rightful Owners within a Year, upon Payment of Salvage. Publick Sale of perishable Goods is forthwith to be made, unless immediately claim'd by some Body, and of other Goods not claim'd within a Twelve Month : And after all Charges deducted, the Residue of the Money arising from such Sale, is to be transmitted to the Exchequer, for the Benefit of the Owner, who upon Proof of his Property before one of the Barons, shall, upon his Order, receive the same. Which is without Prejudice to the Right of the Sovereign, or his Grantee to Jetsam, Flotsam, and Lagan (a).

or what his Creditors affect, or the Fisk challenges; but hath only a Right in Trust for the Behoof of some other, or hath qualified his own Right by a Backbond, or personal Declaration: It is proper here to treat concerning

Trust.

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⁽a) 12 A. Seff. 2. Ch. 18. junct. 4 G. Ch. 12. Sect. 1.

CHAP. IV.

Of Trust.

RUST is the stating a Thing or Right for some End, in the Person of one so far, as that it can hardly be recovered from him, unless he be faithful, and answer the Considence reposed in him, by restoring what is committed to him, or disposing

thereof as the Truster desires.

A Trustee is understood, in Law, to act for the behoof of his Constituent, in relation to the Subject of the Trust. The Way for recovering Rights given in Trust, or getting them apply'd according to the Truster's Design, is by a Declarator of Trust. Trust can be proved against the Trustee, only by his Writ or Oath, except in Bills of Exchange, where it may be cleared other ways (a). But as to a fingular Successor, who being ignorant of the Trust, acquires honestly for an onerous Cause from the Trustee, he is secure, unless the Trust be instructed by Writ of the Trustee. Backbonds, or personal Declarations, even not intimated, affect personal Rights, such as Bonds or Contracts, and real Rights not completed by Seisin in the Persons of singular Successors: But such Bonds, or personal Declarations

(a) Act 25. Seff, 6. Parl. K. W.

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tions, don't affect or burden real Rights whereon Seisin hath followed, so as to oblige singular Successors to take notice of them. Nor
can a Trustee's Declaration on Death-bed afsect his Heir. The proper Exception in a Declarator of Trust, is founded on the necessary
and profitable Expences, wared by the Desender, in Pursuance of the Trust; which afsect the Subject given in Trust, and ought to
be restored to the Trustee, before he be compelled to divest himself thereof.

Prescription being a Way of acquiring and losing, of both heritable and moveable Rights, it falls naturally to be handled now, after all

these have been explained.

CHAP. V.

Of Prescription.

Pretention by the Effect of Time.

2. Tis either positive or negative.

[1.] Positive Prescription, is the Way of acquiring a Thing or Right, fairly and honestly, by peaceable and continued Possession, during the Time regulated by Law, sometimes with, and sometimes without a Title.

[2]. Negative Prescription, is the Way of losing a Thing, Right or Action, by omitting

to demand, use, or exercise it within the Time

limited by Law.

3. Some Things prescribe simply; others as to some certain Effect only, viz. the Manner of Proof, or the Import of a presumptive Right. Again some Things prescribe in 40. some in 20. some in 13. some in 10. some in 5. some in 4. and others in 3 Years. We have also an annual, and a Six Months Prescription.

Prescription of Forty Years.

[1] Moveables are acquired by 40 Years

Possession, without a Title.

A fingular Successor in Lands, Annualrents or other Heritages, hath good Right by a Charter (i. e. any Warrant for Infeftment) and Seifin, with 40 Years peaceable and continued Posession thereon, from the Date of the Infeftment, by himself or bis Author, or their Tenants, having their Right (as Liferenters and Wadfetters). An Heir hath good Right to Such by Instruments of Seifin, one or more (without any Warrant or Adminicle) continued and standing together (i.e. either continued by 40 Years Possession in the Person of the Heir first infest, or by Renovation in the Persons of subsequent Heirs) on Retours or Precepts of clare constat, and clothed with 40 Years uninterrupted Possession. Right of a fingular Successor or Heir, cannot be

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be questioned upon any Ground, except Falfhood (a).

No Person is obliged after 40 Years, to produce Procuratories or Instruments of Resignation, Precepts of clare constat, or other Precepts of Seisin; nor is the Want thereof any Cause of Reduction, after he and his Authors have possessed 40 Years, by Virtue of their Infestments, where the Charters mentioning Relignation to have been made, and the Instruments of Seisin expressing the Precepts, by Virtue whereof Seisines were given are extant (b). By the politive Prescription of 40 Years, not only Lands and Annualrents are acquired; but also Wadsets, where Reversions are neither incorporated in the Right nor registred (c), heritable Offices, Patronages constituted by Infeftment, parsonage and vicarage Tithes, Oc.

By the negative Prescription, all personal Obligations (comprehending personal Actions and Decreets) vicarage Tithes, are extinguished and of no avail, if the Parties, to whom they are made, having Interest therein, do not within 40 Tears follow them, and take Document thereon (d). Vicarage Tithes also so prescribe, both as to a total Immunity, and as to the Manner of tithing in Kind and Quantity. This Prescription doth cut off bygone parfenage Tithe-duties, and all annual Prestations, not sued with-

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⁽a) Act 12. Parl. 22. Jam. VI. (b) Act 214. Parl. 14. Jam. VI. (c) Act 12. Parl. 22. Jam. VI. (d) Act 29. Parl. 6. Act 55. Parl. 7. Jam. III.

in the Term of Law. Personal Bonds, Actions upon heritable Bonds, Contracts, Reverfions, neither in gremio of the Infeftment, nor registred, prescribe; but Actions upon Reverfions, ingroffed in the Body of Infeftments, ufed and produced by the Possessor of the Lands for his Title, or registred in the Terms of Law. are perpetual (a). There is no negative Prescription of Parsonage Tithes, or of Things mera facultatis, or of Exceptions. Nor doth a Vallal prescribe against his Superior, by not paying the Feu or other Duty in his Charter. or a Tenant against his Master, by not paying his Tack-duty, except as to Bygones, not claimed within Forty Years. Minors are privileged from this Prescription, that it doth not run against them: But it runs against the Church, and Mortifications to pious Uses.

Personal Bonds and Obligations prescribe from the Date, Actions of Warrandice from the Time of Distress, and a Wife's Provision in her Contract of Marriage, from the Hus-

band's Death.

Prescription of Twenty Years.

[2.] Retours wrongfully ferv'd cannot be quarrelled after Twenty Years (b). Holograph Writs, or Subscriptions in Account-books, preferibe after Twenty Years, unless the Truth there-

(a) Act 12. Parl. 22. Jam. VI. (b). Act 13 ibid.

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(a). 1. Ch. Seff. 6.

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thereof be proved by Oath of Party (a). Which is not to be understood of the Verity of the Debt, which may be proved by the Party's Oath, at any Time within Forty Years, but only of the Verity of the Writ and Subscription.

Prescription of Thirteen Years.

[3.] Thirteen Years Possession, called decennalis & triennalis possession, is a presumptive Title, sufficient to maintain a Churchman in Possession of his Benefice, till a better be shown in another Competitor.

Prescription of Ten Years.

[4.] The legal Reversion of Apprisings (b), and general Adjudications, where the Debtor doth not produce a Progress (c), prescribe in favour of the Appriser or Adjudger, in Ten Years after Date of the Decreet, and in favour of the Debtor sapparent Heir, acquiring Right to the expired Apprisings or Adjudications in Ten Years, from the Acquisitions being made publick by Infestment or Process. And Actions of Count and Reckoning, direct and contrary, betwire Minors and their Tutors or Curators, prescribe, if not insisted in, within Ten Years after the Minor's Majority, of Death in Minority (d). But none of these Preferips

(a). Act 9. Parl. 2. Seff. 1. Ch. II. (b) Act 62. Parl. 1. Seff. 1. Ch. II. (c) Act 19: Parl. 2. Seff. 3. Ch. II. (d) Act 9. Seff. 6. Parl. K. W.

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Prescription of Five Years.

[5.] Arrestments us'd on Decreets, registred Bonds, or Contracts, not pursued and insisted in within Five Years after laying on thereof, and Arrestments on depending Actions, not pursued within Five Years after Sentence, do

fall by Prescription (b).

Ministers Stipends, Multures, not pursued within Five Years after the same are due, Mails and Duties of Tenants who labour the Ground, by themselves or Subtenants, not claim'd within Five Years after the Tenant's Removal from the Ground, Bargains concerning Moveables, or Sums of Money probable by Witnesses, not sued within Five Years after making the Bargain, prescribe as to the Manner of Proof by Witnesses (c), that is, can be proved afterwards only by Writ, or Oath of Party. And Actions proceeding upon Warnings, Spulzies, Ejections, Arrestments, or for Ministers Stipends, Multures, Mails, and Bargains about Moveables, prescribe in Five, if not wakened, that is, if a new Summons be not rais'd and executed within that Time (d). But none of these quinquennial Prescriptions run against Minors.

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(a) Act VI. (b) 6. Se T.

⁽a) Ibid. junc. Act 6. Parl. 23. Jam. VI. (b) Act 9. Parl. 2. Seff. 1. Ch. II. (c) Ibid. (d) Ibid. junct. Act 14 Seff. 1. Parl. Jan. VII

Prescription of Four Years.

[6.] The Privilege competent to Minors, of reducing Deeds done by them upon Minority and Lesion, prescribe in Four Years, after their Age of 21 Years complete.

Prescription of Three Years.

[7.] Affizers ferving and returning a wrong Perfon Heir, cannot be quarrelled for Error, inorder to Punishment, after Three Years. this Prescription runs not against Minors, or Persons out of Scotland (a). Actions of Spulie, Ejection, and others of that Nature, not purfued within Three Years after committing the Deeds, prescribe, except against Minors (b), as to the Privilege of a short Citation, violent Profits, and taxing the Damage, by the injured Party's Oath in litem. Actions for wrongous Imprisonment prescribe, if not pursued within Three Years after the last Day of the wrongous Imprisonment; and, tho rais'd within that Time, prescribe, if not infisted in yearly thereafter (c). Actions of Removing prescribe against all, whether Minors or Majors, if not pursued within Three Years after the Warning (d), that is, after the Time to which the E e 3 2000 052

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⁽a) Act 57. Parl. 5. Jam. IV. junct. Act 13. Parl. 23. Jam. VI. (b) Act 81. Parl. 6. Act 119. Parl. 7. Jam. VI. (c) Act 6. Sed. 9 Parl. K. W. (d) Act 82. Parl. 6. Jam. VI.

Warning to remove was made. Actions of Debt for House Mails, ordinary Servants Fees, Merchant-accounts (under which other Accounts are comprehended) and the like Debts not founded on Writ, prescribe against all Perfons, whether Minors or Majors, as to the Manner of Proof by Witnesses, if not pursued within Three Years after they fall due; which being elapsed, such Claims can be proved only by Writ, or Oath of Party (a). Prescription of a current Account runs only from the Date of the last Article therein: But a Servant can instruct only Three Years Fees by Witnesses, albeit his Service was current for these and former Years. The Preference of the Creditors of one deceased, as to his Estate, to the Creditors of his apparent Heir, prescribes, if the former do not complete Diligence against the same, within Three Years after their Debtor's Decease (b).

Prescription of one Year?

[8.] The Privilege an apparent Heir hath to deliberate whether he will enter Heir, prefcribes, after elapsing of Year and Day, from his Predecessor's Death (c), or from his own Birth, if he be a posthume Child. The legal Privilege of Apprifers or Adjudgers for perfonal Debts to come in pari passu, is competent to such

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⁽a) A& 83. Parl. 6. Jam. VI. (b) A& 24. Parl. 1. Seff. 1. Ch II. (c) A& 106 Parl. 7. Jam. V. A& 27. Parl. 23. Jam. VI.

fuch only as apprise or adjudge within Year and Day of the Decreet of Apprising or Adjudication, first efectual by Infestment or Charge against the Superior (a).

Prescription of Six Months.

[9.] A Bill of Exchange is not registrable after Six Months from the Date, in case of non Acceptance, or from the falling due thereof in case of Nonpayment (b). The Privilege competent to Executors Creditors, or Creditors doing Diligence against Executors, or Intromitters with the deceast Debtor's Goods, of coming in pari passu, expires, if not used within Six Months of the common Debtor's Death (c):

4. Prescription is acquired only at the last Moment of the Time regulated for prescribing; and the continual Time without Interruption is computed, and not the profitable Time only in which a judicial Demand could be made, while Courts of Justice are patent. But Prescription is acquired to an Heir or singular Successor, after the Possession of his Predecessor or Author, and his own joyned together, have lasted the Time regulated for prescribing.

5. Prescription is excluded by Interruption, which is the Proprietor or Creditor's owning his Right within the Time allowed.

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(a) Act 62 Parl. 1. Seff. 1. Act 19. Parl. 2. Seff. 3. Ch. II. (b) Act 20. Parl. 3. Ch. II. (c) Act of Sed. 28 Feb. 1661.

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Interruption is either natural of civil.

[1.] Natural Interruption is when a Proprietor or Pretender owns his Right by some Fact, and takes Instruments in the Hands of a Notary upon it, which Instrument must be recorded in a particular Register at Edinburgh, within Sixty Days after the Date, otherwise it doth not militate against singular Successors, but only against the Person instrumented. Nor is natural Interruption effectual against any, save the Heritor and Possessor of the Ground (a).

[2.] Civil Interruption is made by Citation, or making a Demand in a Court of Justice, or by a Charge of Horning. A Summons for interrupting the Prescription of real Rights must pass upon a Bill, and tontain the Ground and Warrant it proceeds on (b). It should be executed by a Messenger at Arms, against the Defender, personally, or at his Dwelling-place, and at the Parish-church, at or immediately after divine Service, on the most patent Door whereof Copies must be affixed. And if the Defender be out of Scotland, he must be cited at the Market-cross of Edinburgh, and Pier of Leith, upon Sixty Days (c). The Execution is to be recorded in a particular Register at Edinburgh, Within Sixty Days after Date, otherwise it is of Force only against the Persons cited, and not against fingular Successors (a). Ch. 5

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Prescription of an Action must be interrupted by Process of the same Kind, containing the fame Conclusion. All Citations for Interruptions, whether of real or personal Rights, prescribe, if not renewed every Seven Years, except the Parties be Minors (b). Where several Persons have Interest in the same Thing, or Right, as Proprietors or Creditors, or are liable to deliver, or pay as Debtors, whether Principal or Cautioners; a Demand made by any one, or against any one of them, interrupts Prescription with respect to them all. Suing or charging for Part of a Debt, interrupts Prescription of the whole; and a Right of Annualrent, due out of Two distinct Tenements. is preserved intire as to both, by uplifting the lame out of either.

BOOK II.

How Property is transmitted to universal Successors.



HE Transmission of Property to universal Successors, is termed Succession.

CHAP.

(a) Act 19. Seff. 6. Parl. K. W. (b) Act 10. Parl. 2. Seff.1. Ch. II.

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Of Succession and the several Kinds of it.

S UCCESSION is a Right to enter upon that Estate, real or personal, which one deceased had at the Time of his Death.

1. Succession is, 1. Either provisional or

legal.

[1.] Provisional Succession is, that which transmits the Estate of one who dies, to the Person or Persons whom the Deceased has called to the Succession, whether related to him or not, by an express Deed under his Hand.

[2.] Legal Succession is, that which transmits the Estate of one who dies, without having disposed of it, in the Event of his Death, to the Person or Persons whom the Law calls to the Succession, by virtue of their Proximity of Blood. Legal Succession passeth over Estates to Kindred, according to the Lines and Degrees of Consanguinity; for no Person succession by Affinity (a). This Succession is either by the Head, or by the Stocks. Succession by the Head is, when the Estate is divided into equal Portions, according to the Number of the Persons who succeed. Succession by the Stocks is, when, by a Fiction of Law, Persons

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⁽a) Vid. Part 1. Book 2. Chap. 2. Tit. 1. 9 2.

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fons, in a remoter Degree, come, by Representation, into the Place of one in a nearer Degree to the Deceased, and divide that Share among themselves, which he would have received had he been living. to matina ...

2. Succession is distinguished, 2. Into Succeffion to Heritage, or a real Estate; and Succession to Moveables, or a personal Estate. thers by Deceale, without leaving the

Denomination therein frecined. CHAP. H. November of the his Body, or the Heires and o of his

Of Succession to Heritage, and the several Kinds of Heirs.

which failings to a Thand Perford. HE Person who succeeds to the Heritage, or heritable Rights of one deceased, is called his Heir. Heirs are either Heirs institute, or Heirs at Law.

1. An Heir institute is one to whom the Right of Succession is ascertained by Disposition, or express Deed of the Deceased. Such are Heirs of Tailie in general, under whom I comprehend Heirs male, Heirs of Tailzie properly fo called, Heirs of Provision, and Heirs substitute in Bonds, who may be called special Heirs. Proximing of Blood.

1. An Heir of Tailzie in general, is he on whom an Estate is settled, that would not have fallen to him by legal Succession.

[2.] An Heir male is an institute Heir, who, tho not next in Blood to the Deceased, is his nearest male Relation that can succeed to

[3.] An Heir of Tailzie, in a proper Sense, is one, who, having no Right of Blood, is intitled to Succession by a Deed containing several Substitutions of Heirs or Lines, failing others by Decease, without leaving those of the Denomination therein specified. As when an Estate is provided to the Fiar, and the Heirs of his Body, or the Heirs male of his Body, or his Heirs of a certain Marriage, or to his eldest Heir female; which failing, to another Person named, and his Heirs of such a Kind, which failing, to a Third Person, &c. (a).

[4.] An Heir of Provision is one, who, wanting the preferable Right of Blood, succeeds by virtue of a particular Provision in a Second or Third Contract of Marriage, or other Difposition, as Heir to his Parent, in which there are not divers Persons or Lines substitute.

[5.] An Heir substitute in a Bond, is he to whom the Bond is payable expresly, in case of the Creditor's Decease, or after his Death.

2. An Heir at Law, is one to whom the Law gives the Inheritance, on account of his Proximity of Blood. He is also termed Heir of Line, because he succeeds lineally by Right of Blood; and Heir general, because he generally represents the Deceased, and succeeds to

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⁽a) Vid. Sup. Part 2. B. I. Chap. 2. Tito f. \$ 19

every Thing not specially provided to other Heirs, whence he is understood by the Denomination of Heir what soever.

Heirs of Line are divided into those proper-

ly so called, and Heirs of Conquest.

1. An Heir of Line, in a proper Sense, is one who fucceeds to the Deceased in his Heritage, i.e. Lands, and other heritable Rights derived to him by Succession, as Heir to his Predecessor.

2. An Heir of Conquest is one who fucceeds to the Deceased in Conquest, i. e. Lands or other heritable Rights, to which the Deceased neither did, nor could succeed as Heir thelesandents, if there

to his Predecessor.

3. The legal or lineal Succession is regulated thus.

1. Descendents succeed. Among whom the eldest Son, by Right of Primogeniture, is preferred to all his Brothers, and all the Sons to the Daughters. If there be only Daughters, they succeed all equally to the Estate, in so far as it is divisible, who therefore are called Heirs Portioners. If the Person to be succeeded to have Sons, and Grandchildren by his eldelt Son deceased, these Grandchildren will, by Right of Representation, as come in place of their Father, exclude his Brothers; and among such Grandchildren, the eldelt Male is preferred, and all the Males to the Females. If there be only Females, they succeed equally, lave only that indivisible Rights go to the eldeft,

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s to very dest, as in the Case of semale Children. The same Rule is observed in Descendents of remoter Degrees, when they fall to succeed.

- 12. If the descendent Line be spent, Succesfion goes to the collateral Line. In which the whole Blood excludes the half Blood. For, 1. If there be only one Brother german, he and his Descendents succeed to both Heritage and Conquest. 2. The Sister or Sisters german, as Heirs Portioners, and their Descendents. 3. Failing Brothers and Sifters german, a fole Brother by the Father's Side, and his Descendents, have Access to the Succession. Sifter or Sifters by the Father's Side, and their Descendents. If there be several Brothers, and the middle of three Brothers die, leaving both Heritage and Conquest, Law creates two Heirs to him, viz. makes his immediate elder Brother Heir of Conquest, and the immediate younger Brother, his Heir of Line. If a Son of a fecond Marriage die without Issue, leaving two or three Brothers of a former Marriage, the youngest is both Heir of Line and of Conquest. Heritage descends, but Conquest ascends.

[3.] If there be no Brothers or Sisters german or consanguinean, the Succession ascends, 1. To the Father of the Deceased. 2. Failing the Father, the Father's Brothers and Sisters succeed in their Order. 3. Failing the Father's Collaterals, the Succession mounts to the Grandfather. After whom, it goes aside

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to his Collaterals. Which failing, it reacheth to the great Grandfather, Oc. so long as any Propinquity of Blood can be instruced.

[4.] If the Defunct's Blood be spent, so as no Person can justly claim to be of Kin to him, the King succeeds as last Heir (a).

4. Agnats only, and not Cognats succeed, even tho the Heritage came by the Mother.

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CHAP. III.

How Heirs make up and perfect their active Titles; and how such Titles are extinguished.

HE who should be Heir of whatever Kind, is term'd apparent Heir, till he enter upon the Estate generally, or specially.

neral Brief out of the Chancery of course, directed to any Judge he desires, for trying by an Inquest of 15 sworn Men, if such a Person died at the King's Peace; and if the Raiser of the Brief be his nearest and lawful Heir. If the Inquest sind the Claim proven, they declare by a Writ, called a general Service, that the Predecessor mentioned in the Brief, died at the King's Peace, and that the Bearer thereof is his nearest lawful Heir. Upon returning where-

⁽⁴⁾ Vid. fupr. B. 1. Ch. 3. N. 3.

whereof to the Chancery, the Heir gets an Extract of it, subscribed by the Director of the Chancery, or his Deputy, called a general Retour. Which intitles him to all heritable Rights, whereupon the Deceas'd was not, nor needed to be infest. An Heir may be infest in Tenements within Burgh, upon a general Service, and Production of his Predecessor's Infestment; or by Hasp and Staple, when the Bailie of a Burgh Royal delivers to him the Hasp and Staple of the Door, as Symbols of Seisin, after he hath cognosced his Proximity of Blood to the Deceas'd, by an Inquest of the Neighbourhood, to which the Clerk of the Burgh must be Notary (a).

2. In order to infeft an Heir in Lands in the Country, or other heritable Rights, wherein the Predecessor died infest, he must enter specially. An Heir enters specially, either in the ordinary Course of Law, or by the Su-

perior's voluntary Deed,

[1.] Entry in the ordinary Course of Law is, by taking a special Brief out of the Chancery, directed to the Judge ordinary, where the Lands, &c. ly, to enquire by an Inquest, 1. If such a Person died last vest and seised in such Lands, at the Peace of the Sovereign. 2. If the Raiser of the Brief, be next lawful Heir to him therein. 3. Of whom the Fie is held in capite. 4. What is the Manner of holding, 5. What is the old and new Extent of the Fie.

(4) Act 27. Parl. 1. Jam. VI.

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Fie. 6. If the Heir be of lawful Age. 7. Of whom the Fieis now held, from what Time, how and by what Service, and through what Cause. This Brief is proclaim'd by Order of the Judge, upon 15 Days warning, at the Marketcross where the Lands, Oc. ly, that all Perlons having Interest, may appear at the Day and Place appointed, to hear and see the Brief fery'd and retour'd, and an Inquest is summoned at the Day appointed for the Service; the Inquest, if they find the Points of the Brief clear instructed, they serve the claimant Heir in special, in the Lands, Oc. Which special Service being returned to the Chancery, he gets an Extract thereof from the Director, called a special Retour, which includes a general Service, as a Part thereof. The Heir specially served and retoured, if the Lands hold immediately of the King, obtains a Precept out of the Chancery of Course to the Sheriff, or other Judge ordinary, where they ly, to infeft him, capiendo securitatem for a Sum equivalent to the nonentry Duties resting, and for the Relief. Upon which, if Seisin be not taken before the next Term after, the Heir must take out a new Precept, before he can be infeft. The Sheriff, or other Judge ordinary must give Seisin, and the Clerk of the Jurisdiction be Notary to it; the Seifin upou other Precepts out of the Chancery may

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be given by others, as Bailies or Notaries (a). A Seisin Ox is due to the Sheriff or Judge ordinary, for giving Infeftment. But the Heirs of Vaffals of Church-lands, whose Valuation is but 100 L. Scots or under, are free of paying a Seifin Ox, and their Dues to the Judge ordinary, exceed not the twentieth Part of their feu Duties (b). If the Judge ordina-Ty refuse to infeft the Heir, the Lords of Session will, upon Application, and Instruments taken against him of his Disobedience, grant Warrant to the Director of the Chancery, to issue forth a Precept to any other Person, as Sheriff or Bailie in that Part, to grant Infeftment. Vassals of Church-lands in Orkney and Zetland, not exceeding 20 L. Scots of Valuation, bruik by the Udal Right, without Renovation of their Infeftments (c).

When Lands are retoured to be held of a Subject Superior, he sometimes, upon Sight of the special Retour, grants willingly to the Heir a Precept of Seisin, called a Precept of clare constat, upon a special Retour. But if he, being insest in the Superority, result to grant such a Precept, he may be charged by three consecutive Precepts, issued forth of the Chancery, to insest the Heir, and upon Report to the Chancery, of his persevering in Disobedience, after he was required by the

(a) A& 77. Parl. 6. Jam. V. junch. A& 15. Parl. 18. Jam. VI.8 [(b) A& 11. Seff. 7. Parl. W. and M. (c) A& 32. Seff. 2. Parl. W. and M.

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last Precept, the Director of the Chancery issueth a fourth Precept to the Sheriff or other Judge where the Lands ly, if the contumacious Superior be the King's immediate Vaffal, or to his immediate Superior, where he holds of another Superior interjected betwixt him and the King, and upon that Superior's Disobedience, to the Judge of the proper Jurisdiction, commanding him to give Infeftment to the Heir. If the contumacious Superior is not infeft in the Superiority, the Heir may, after the three confecutive Precepts aforefaid, charge him perfonally, or at his dwelling Place, to enter Heir in special to his Predecessor last infeft, within 40 Days, if within Scotland, and at Edinburgh Cross and Pier of Leith on 60 Days, if forth thereof; and, the Days of the Charge being elapsed, may pursue a Declarator of Tinsel of Superiority. Upon Declarator obtained against the apparent Superior, his immediate Superior may be purfued fummarly to supply his Place, under the Pain of Tinfel of his Right of Superiority.

Retours are ordinarily reduced by a grand Inquest of 45 Members, upon a Latin Summons of Error. In which Process of Error, the Pursuer craves, that the Service may be reduced, because he is a nearer Relation to the Deceased, than the Defender; and that the Inquest who served such a one Heir, have erred, and ought to be punished in their Perred,

fons and Goods, tanquam temere jurantes super assis, that is, by escheating of their Moveables, a Year's Imprisonment, and Insamy, (a). The Retour may be reduced, without declaring the Inquest guilty of wilful Error: As when the Error was not evident and gross, nor inferred upon Grounds represented to the Inquest, at the Time of their Verdict, or not pursued within three Years. And a Retour may be reduced at any Time within twenty Years (b), even upon other Grounds than those offered to the Inquest.

[2.] One enters Heir by the Superior's voluntary Deed, when, without serving himself Heir, he gets from the Superior a Precept of clare constat. In which the Superior acknowledges, that such a one died last vest and seised in the Lands or others to be entred to, holden of him by such a Tenure; and that the Person mentioned in the Precept is next lawful Heir to him therein, and of lawful Age to enter, and therefore commands his Bailie to inset thim. Seisin cannot be taken upon a Precept of clare constat, after Death of the Granter, or Receiver of the Precept (c).

3. An Heir may enter any of the ways aforefaid, either with, or without the Benefit of Inventory. The Manner and Time of giving up, recording, extracting such Inventory, and eiking Ch.

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⁽a) Act 48. Parl. 6. Jam. III. junct. Reg. Maj. Lib. 1. Cap. 14. Skene, Not. 161. (b) Act 57. Parl. 5. Jam. IV. junct. Act 13. Parl. 22. Jam. VI. (c) Act 35. Seff. 4. Parl. Will and Mary.

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eiking to it, is prescribed by Law (a). Seisines in favour of Heirs, must be registred in the same Manner as Seisines granted to singular Successors.

4. Heirs in some Things, as Tacks, Pensions, Reversions, Obligements in savour of Heirs of a Marriage, to be performed before the Father's Death, and some Heirs, as those substituted in Bonds immediately to the original Creditor, want not to be served for making up their active Titles.

Having thus let forth how the active Titles of Heirs are made up and extinguished, I shall now consider what Interest they have, by being Heirs, which is either active or passive.

CHAP. IV.

The active Interest of Heirs.

THE active Interest of Heirs is the Benefit they are intitled to: Which is partly competent to them before they enter Heirs, or own the Right in their favour, partly after they are entred, or have owned the Right. The Benefit accruing to Heirs before their Entry, is common to all apparent Heirs: The Advantages belonging to Heirs entred are appropriated to them respectively.

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(e) Act 24. Seff. 5. Parle K. Will,

TIT. I.

The Advantages and Privileges competent to all apparent Heirs.

AN apparent Heir, of whatever Kind, has, during his Apparency, several valuable Rights and Privileges belonging to him, as 1. The Law of Death-bed. 2. The Year of Deliberation. 3. Exhibition ad deliberandum. 4. Aliment out of the Predecessor's Lands, &c.

SECT. I.

The Law of Death-bed;

r. THE Law of Death-bed is an ancient Privilege, introduced in favour of Heirs by immemorial Custom, that they cannot suffer Prejudice by their Predecessor's disposing of, or affecting gratuitously his real Estate directly, by Disposition, or making Infestments of Annualrent or heritable Bonds, &c. or indirectly, by granting personal Bonds, whereupon the same may be adjudged. But such Deeds, is consented to by the Heir, are good: And a Person may on Death-bed, without Consent of his Heir, persect an old Right, or do a Deed, to which he might have been otherwise compelled, as for Payment of his Debt; or may

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may grant a new Right for an equivalent onerous Caufe.

2. A Deed is understood to be in Deathbed, if before figning and Delivery thereof, the Granter was fick, and never convaledced thereafter. Which may be anulled or overturned by Reduction ex capite lecti, at the Inflance of the apparent Heir, or of his Creditors,

or of the Creditors of the Decealt.

3. The common Defences in this Action are, 1. That the Author of the Deed quarrelled, was at the Time in liege pouftie, that is, in per-2. That tho' he was fick at the fect Health. making of the Deed, yet he recovered perfect Health thereafter. Which Defences are allowed to be proved two ways, 1. By his going free and unsupported to, and returning from Kirk or Market in Day-time, when People are there gathered together, after the Deed quarrelled (a). 2. By his living Sixty Days after the Deed, tho' during that Time he went not to Kirk or Market (b).

4. The ordinary Reply to the first Qualification of liege pouftie is, that the Deceast did not walk to Kirk or Market freely, but was supported, and appeared to have strained Nature. Before Answer to the Relevancy of which contrary Alledgances, the Lords allow Witnesses to be produced by either Party, as to the Condition of the Health or Sickness of the Decealt,

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⁽a) Act of Seder. 29 Feb. 1692. (b) Act 4. Seff. 6. Parl:

as to his going to Kirk or Market, and the Manner of it, and the Symptoms of Sickness

that appeared on him.

It is relevant to reply to the Second Qualification of liege pouftie, founded on the Granter of the Deed's surviving it Sixty Days, that his Sickness so affected him at the Time of doing the Deed quarrelled, that he was not of sound Judgment and Understanding (a).

5. Some Deeds are prefumed to have been granted on Death-bed, as holograph Writs wanting Witnesses, until the contrary be pro-

ved.

SECT. II.

The Year of Deliberation.

A N apparent Heir hath Year and Day to deliberate, whether he will enter or renounce. Which runs from the Predecessor's Death, unless the apparent Heir be a posthume Child, whose Tutor has a Year after his Birth, allowed to deliberate what is proper to be done for the Pupil in that Matter. He cannot be pursued within the Year of Deliberation (b): But Citation upon a Summons given within the Year, to appear on a Day without the Year, is sustained. This Privilege of a Year to deliberate, is past from by the apparent Heir's renouncing within the Year.

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⁽a) Ibid. (b) Act 76. Parl. 6. Jam. IV.

Ch. 4. Law of Scotland. Tit. 1. 9 3, 4. 89

SECT. III.

Exhibition ad deliberandum.

AN apparent Heir may (without instructing any Title, or proving his Proximity of Blood, unless he be a Foreigner) pursue Exhibition ad deliberandum, at any Time before he enter Heir, either within the Year of Deliberation, or after it is expired. In which Process he may call for a Sight of all Rights or Writs granted to or by his Predecessor, or that were in his Possession quovis modo at his Death: That he may see whether he will find his Account in entring upon the Estate. But he cannot infift for Delivery of the Writs exhibited, or to have them transumed upon his own Charges: Nor yet can he oblige fuch as had Dealing with his Predecessor, to count and reckon ad deliber randum.

SECT. IV.

Aliment out of the Predecessor's Lands, &c.

titled to Aliment out of them during the Ward, according to his Quality, if he hath no other Feu or Blench Lands to live upon, or to what is wanting of a sufficient Aliment out of his other

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other Lands (a). And any other apparent Heir, whose Predecessor's Estate is liferented, if he cannot aliunde entertain himfelf, gets Aliment off the Liferenter, not being a Liferenter

by Refervation (b).

2. An apparent Heir may defend his Predeceffor's Right, whether he be cited, or compear for his Interest; and may continue his Predecessor's Possession, and pursue Mails and Duties against the Tenants. He is allowed to bring the Predecessor's Estate to a Roup, whether Bankrupt or not. Again, an apparent Heir to the apparent Heir who died, after he had been Three Years in Possession of the Predecessor's Estate, passing him by, and serving Heir to a remoter Predecessor last infest, is liable to the Debts and Obligements of the interjected Predecessor, to the Value of the Estate, deducing Debts already paid, with Preference of his own Debts already contracted, and the Debts of the Predecessor to whom he is ferved (c). Apparent Heirs are also intitled to fuch heritable Rights as require no Service of an Heir.

TIT.

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Active 1 Heirs

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⁽a) Vid. Part z. B. z. Chap. 3. Tit. 3. N. 1. (b) Ibid. Chap. 4. Tit. 4. Sect. 1. (c) Act 24. Seff. 5. Parl. K. Will.

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b) Ibid. K. Will.

TIT. II.

Active Interest competent to the Several Kinds of Heirs after they are entred.

1. TTEIRS male, and Heirs of Tailzie I and Provision are intitled to no more than the Subject provided to them, or what is accessory thereto. Obligements, in fayour of Heirs of Tailzie or Provision, are always effectual against the Heir of Line, in relation to whom, the Heirs of Tailzie or Provifion are confidered as Strangers or Creditors. Where Infeftment is granted to a Man and his Wife, and to the Heirs or Bairns of the Marriage, male and female fucceed equally, and Daughters exclude Sons of another Marriage: But the Father may, if he please, exercise his Power of Division thereof. A Provision of the Conquest, during a Marriage, to the Heirs or Bairns thereof, reacheth only to what more the Father had at his Death, than when the Contract was entred into, with the Burden of all his Debts contracted upon the account of fuch Acquisition. Heirs of Provision, whether in a particular Subject, or by Clauses of Conquest, cannot suffer Prejudice by any posterior arbitrary, or merely gratuitous Deed of the Person whom they represent.

2. If there be no Heir institute, a sole Heir of Line enjoys the whole Estate, where there is

no Conquest, and an Heir of Conquest. If there be several Heirs of Line, as when Heirs Portioners succeed, the Estate is divided amongst them equally, so far as it may admit of Division: But Rights indivisible, as Titles of Honour, Superiorities with the Casualties thereof, and the principal Messuage, or Country-dwelling-house go to the eldest Heir Portioner, without giving Compensation, or any Thing in lieu thereof to the other Co-heirs. She is also preferred to the Custody of the Writs.

3. When there are both an Heir of Line and an Heir of Conquest, the Heir of Line has Right, 1. To all heritable Rights, derived to the Deceased from his Predecessors, requiring Infeftment to their Accomplishment, whether perfected by Infeftment or not, and to all Reversions of such Rights. 2. To all Tacks, Pensions, or annual Prestations, and other Rights requiring no Infeftment, and not competent to Executors, by their including tra-Etum futuri temporis. 3. To Bonds wherein Executors are excluded. 4. To heirship Moveables, which are the best of every Kind of Moveables belonging to the Deceased, that is, Bodies, or Things in Kinds, and not Quantities or Fungibles. This heirship Moveable is sometimes a single Thing, sometimes a Pair, or Dozen of Things of one Sort, according as they are used by Pairs or Dozens. Heirship Moveables belong only to the Heirs of Prelates,

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lates, Barons and Burgesses. Under Prelates Law comprehends all beneficed Persons, in beneficio at their Death. By Barons are signified all Persons dying, infest in Lands or Annualrents; and those, once infeft, are prefumed to continue so till Death, unless the contrary be proved. But no Person, of any of the Characters aforefaid, hath heirship Moveables, if he died at the Horn, and his Escheat was gifted and declared. 5. The Heir of Line falls to be Tutor of Law, as nearest Agnate to a Pupil or Ideot.

The Heir of Conquest succeeds to Lands, or heritable Rights acquired by his immediate Predecessor, whereupon Infestment did, or might follow, and to Reversions of such, who is not bound to relieve the Heir of Line of Debts contracted for making the Acquisition: But after an Heir of Conquest hath once succeeded, that, which before was conquest, becomes Heritage, and descends to his Heirs of

Line.

4. When an Heir of Line concurs with an Heir institute, the former has Right to every Thing not specially provided to the latter.

5. Tho' some of the Heirs aforesaid got the whole Heritage, others only particular Lands or Rights, some fall to the Succession alone and folidly, others only by equal Parts, or proportionably; all of them succeed in univer-Jum jus defuncti, that is, to the whole Right of such a Kind, but not to the Whole of each

Right,

Right. No Heir can dispone his Predecessor's Estate, to the Prejudice of his Predecessor's Creditors, till a full Year after the Predecessor's Death (a).

CHAP. V.

The passive Interest of Heirs.

HE passive Interest of Heirs, is the Engagements and Burdens they are subject to, after or before their Entry, called passive Titles.

TITLE I.

The passive Title to which Heirs are liable by being entred.

Inventory made, given up, recorded and extracted in due Form, he is answerable no further than to the Value of the Heritage contained in the Inventory: But if he hath meddled before unnecessarily, that is, not simply for Custody and Preservation, or thereafter with any Thing fraudulently omitted out of the Inventory, he is liable universally (b).

2. Heirs

(a) A& 24 Seff. 1. Parl. 1. Ch. II. (b) A& 24. Seff. 5. Parl. K. W.

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2. Heirs entring fimply, without the Benefit of an Inventory, stand engaged folidly to all the Debts owing by the Deceased, and to all the Kinds of Obligations to which he was a Party, and which might affect his Estate, tho the Inheritance will not fatisfy thefe. Because such an Heir is reputed, in Law, one Person with his Predecessor, and their Condition is the same, Under Heirs entring simply, I don't comprehend Heirs nominatim fubfitute in Bonds, who are liable only to the Value of the Sums they got by the Substitution. Albeit an Heir entring fimply succeeds only to heritable Debts owing to the Defunct, he may be fued for moveable Debts owing by him, if the Creditor think fit : But the Heir paying, may get Relief off the Executor, fo far as the free Moveables will extend.

3. Tho' Heirs be liable for their Predeceffors Debts, all Heirs are not liable the same
Way. For, 1. Heirs Portioners, tho' joyntly
bound for the whole Debt, are severally answerable only provata, every one for her own Share,
until the rest of the Co-heirs be discussed: But
if one of them should turn insolvent, the solvent Heirs should be liable for the Whole. 2.
One serving himself Heir to a remoter Predecessor, last insert, passing by his immediate Predecessor, who died unentred, after he had possettled the Estate Three Years, is liable to the
Debts and Obligements of the said interjected
Predecessor, only to the Value of the Estate,

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deducting Debts already paid: Whose own Debts, and those of the Predecessor to whom he enters, are preferred to the Debts of the interjected Predecessor(a). 3. Heirs of Tailzie do not represent the Deceas'd, in Obligations contrary to the Terms of the Tailzie; nor yet do Heirs of Provision represent him simply: For they are not bound to relieve the Father's Cautioner, for Implement of the Provisions made to them, tho' he be Creditor to the Father for his Relief. Nor are they liable to stand to the Father's posterior, voluntary gratuitous Deeds, to their Prejudice, but only to his Obligations for onerous Causes, or just and rational Confiderations, as the providing a competent Joynture to another Wife, or giving suitable Portions to Children of another Marriage. 4. All other Heirs, not having the Benefit of Inventory, are liable to their Predecessor's Debts in solidum.

4. Heirs have a Privilege, that they can be sued only in a certain Order, one after another is discussed, called the Benefit of Order or Discussion. Thus general Obligations, not relating to particular Lands, affect 1. The Heirs of Line. 2. Heirs of Conquest. 3. Heirs of Taizlie, who are Blood-relations to the Deceased, as 1. Heirs male. 2. Heirs of Marriages. 4. Heirs of Tailzie or Provision, who have no Right of Blood. 5. Heirs substitute by Name in Bonds. But the Order aforesaid of discussing

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fing is not observed. I. Where the Heir Infitute is expressly obliged to relieve the Heir of Line. 2. For fulfilling Deeds relating only to particular Lands, or heritable Rights, the Heir who succeeds to these Lands or Rights, must be pursued before the Heir of Line. 34 Where the Predecessor hath, in his Obligation, expressly renounced the Privilege of discussing his Heirs, any Heir may be sued at the Creditor's Option.

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Passive Titles to which apparent Heirs may be li-

THE SE are, t. Their being lawfully charged to enter Heir, and not renouncing. 2. Gestio pro herede, or behaving as Heir. 3. Lucrative Succession, post contractum debitum.

SECT. I.

The passive Title of lawfully charged to enter Heirs and not renouncing.

1. AN apparent Heir declining to enter Heir, to the end his Predecessors Creditors may affect their Debtor's Estate for their Payment, may, if within Scotland, be charged to enter Heir to him within 46 Days, at the Instance of a G & Crea

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Creditor of the Deceas'd, with Certification, if he enter not, fuch Process will be granted against him, as if he were actually entred. This is called a general Charge to enter Heir; which is given by virtue of Letters of general Charge, paffing the Signet, and may be executed against the apparent Heir, within the Year of Deliberation (a). After elapsing of which Year, and of the Days of the Charge, the apparent Heir may be pursued for Payment: For a general Charge to enter Heir, Supplies the Place of a general Service; and thereupon the Creditor of the Deceas'd, reacheth both the Person of the apparent Heir of his Debtor, and any Estate established therein, unless he renounce.

2. But in order to affect Heritage not established in the Person of the apparent Heir, he must be specially charged to enter Heir to his Predecessor, within 40 Days (b), by virtue of Letters of special Charge, under the Signet, obtained upon a Decreet, for Payment, against the apparent Heir. Which special Charge is in place of a special Service, and is used in Two Cases. 1. When the apparent Heir's Predecessor is Debtor to the Charger; in which Case, the Debt must be constituted against him passive, by a Decreet upon the general Charge, before the special Charge is given. 2. A special Charge is serv'd against the apparent Heir, for Debt contracted by himself: In which Case

(4) Act 106. Parl. 7. Jam. V. (6) Act 27. Parl. 23. Jam. VI.

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and upon ceffor in du entire whice the Creditor may, without any previous general Charge, charge his Debtor to enter Heir specially to his Predecessor's Lands and Heritages, with Certification, if he enter not, he, the Creditor, shall have such Process and Execution against these, as if he were entred. Such a special Charge may be given, and Process, after elapsing of the Days in the Charge, may follow at any Time after the Predecessor's Death.

3. Both general and special Charges to enter Heir, are allowed against Minors as well as Majors (a), even against such as cannot enter, were they willing, viz. minor apparent Heirs

in Ward-lands.

4. There is no Necessity of a general or special Charge to enter Heir, in order to pursue Reductions, Declarators, or real Actions, which are competent against apparent Heirs,

without a previous Charge.

and proper Estate, from Distress by Process, upon a general or special Charge for his Predecessor's Debt, by renouncing the Inheritance in due Form and Time, while Things are still entire, that is, before he has done any Act, which implies his Acceptance of the Succession.

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Gestio pro herede, or behaving as Heir.

Title, whereby an apparent Heir receiving what he has no Right to, but in the Quality of Heir, or doing that which he could not do but as Heir, or which denotes his Willingness to be Heir, is liable to all his Predecessor's Debts.

This paffive Title is inferred, 1. By Intromission with either the moveable Heirship, formatly drawn and separated as such from the other Moveables, or any Kind of Moveables out of which Heirship could be drawn. Against which this Defence lies, that the Deceast could have no Heirship Moveable, because, 1. He was neither Prelate; nor Baron, or Burgels. 2. He died at the Horn, and his Escheat was gifted and declared before the Creditor's Purfuit. 2. Tis Behaviour as Heir, to enter to possess or meddle with any heritable Estate belonging to the Deceast, to which the Intromitter would succeed as Heir, as to cultivate or farm out the Ground, or reap the Fruits of it. 3. This passive Title is incurred, by the apparent Heir's possessing his Predecessor's Estate, by virtue of a Right to Apprifing or Adjudication, for the apparent Heir's own Debt, real or feigned, acquired by him before or after

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expiring of the legal Reversion, as if no such Right were in his Person (a). 4. It is reputed Behaviour in an apparent Heir, to purchase by himself, or other Person to his behoof, any Right to his Predecessor's Estate, redeemable or irredeemable, other ways than as highest Osterer at a publick Roup without Collusion, or to possess the said Estate by Rights or Diligences, established in the Person of a near Relation, to whom he may also succeed as Heir, not lawfully purchased at a publick Roup (b).

3. One is not passive liable as having acted as Heir, by raising Brieves to serve Heir, whereon no Service followed, or by a Decreet passing against him, upon his failing to prove Payment of a Debt owing by the Deceast, which he, being sued for the same, undertook to do; or by his paying some of the Predecessor's Debts; or by an Heir of Line's renouncing the Inheritance in savour of an Heir male, to whom the Deceast had disponed it, tho he receive a Gratuity for letting it go, seeing no Creditor sustains Harm thereby, and the Heir male might have forced him to renounce.

4. No acting apparent Heir is liable to this passive Title, but he who has Right to succeed to the Subject meddled with: Nor can it be pursued against the Behaver's Heir, unless there was, at least, an extracted Act of Litiscontestation upon it against himself.

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⁽a) Act of Seder. 28 Feb. 1662. (b) Act 24. Seff. 5. Parl. K. Will.

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5. Behaviour as Heir doth make the Actors liable no further, than if they were served Heirs. But they have no Benefit of Discussion competent to Heirs lawfully entred, nor direct Relief when distressed, from the Heirs liable before them.

SECT. III:

Lucrative Succession post contractum debitum.

tractum debitum, is a passive Title, by which one accepting from another, without any one-rous Cause, a Disposition of any Part of his Heritage, to which the Receiver would have succeeded as Heir to the Disponer, is liable to all the Granter's Debts contracted before the said Disposition; which is accounted pracepting hereditatis, Anticipation of the Inheritance.

Accepter of a gratuitous Disposition of Lands, Annualrents, or other Heritage, to which he might have succeeded as Heir of Line or Conquest, or as Heir male, or of Tailzie or Provision; whether he be, for the Time, immediate, or mediate apparent Heir, if otherwise, necessarily to succeed by Course of Law, as the Disponer's eldest Son, or that Son's eldest Son. But taking a Bond of Provision, or a Right to moveable Heirship or Tacks, or a Disposition to Things which the Receiver might not have otherwise succeeds

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ceeded to, as an apparent of Tailzie's getting a Disposition of what would have fallen to the Heir of Line, or the Heir of Line's accepting a Disposition of tailzied Lands, doth not infer this passive Title. Nor is it incurred by a Father's Disposition to his second Son, while the eldest is alive; or by a Disposition from one Brother to another, tho' the Disponer had no Child for the Time; or by Disposition to a third Person, for the behoof of the apparent Heir.

3. To found this passive Title, 1. Both the Disposition and Infertment thereon must be after the Disponer's contracting Debt; for an Infeftment posterior to the Debt, upon a Difposition anterior thereto, doth not infer it. And the Debt is understood to be contracted, when taken on, and not only when it is constituted by Bond given for it, or Decreet against the Debtor. 2. The Disposition must be either without any onerous Caule, or for a Cause within half the Value of the Thing dilponed. For if the Cause be adequate, or near to the Worth of what is disponed, this passive Title is not incurred.

4. This passive Title doth (as the former of Behaviour as Heir) make the lucrative Successor liable in the same Manner, as if he

was entred Heir, and no further.

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CHAP. VI.

Of Succession to Moveables and personal Rights.

SUCCESSION to Moveables is either authorized by Law, or unwarrantable.

TIT. I.

Of Succession to Moveables and personal Rights, authorized by Law.

SUCCESSION to Moveables and personal Rights authorized by Law, is that which is regulated by the express, or presumed Will of the Deceased.

2. His express Will is declared by a Testa-

ment, or Codicil made by himself,

3. A Testament is a deliberate and just Disposition, of what one would have done, concerning his moveable or personal Estate after his Death, with or without the Appointment of an Executor. Which is called a Testament Testamentary.

4. A Codicil is a less solemn Will of one that dies testate or intestate, by which, if testate he burdens the Executor in his Testa-

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ment, and if intestate, his Executor at Law, or nearest of Kin, to pay some Legacies, or do some other thing after his Decease: Or whereby one alters, retracts, or explains something in a Testament made by him.

Testament made after his Death by the Commissary or consistorial Judge, according to the Direction of Law, called a Testament Dative. The Reason why it is so called, will afterwards appear.

SECT. I.

Of Testaments Testamentary.

1. TESTAMENTS reftamentary,

are either written, or nuncupative.

2. A written Testament is, that which, at the Time of making thereof, is committed to Writing. Which must be either holograph, all written with the Testator's own Hand, or subscribed by him, before two Witnesfes, if he can write, or by a Notary and two Witnesses, if he cannot write. And a Minister is authoriz'd by his Character, to officiate as Notary in Testaments (a).

3. The like Solemnity is required in Codicils and Legacies above 100. L. as in Techaments. A Testament made in England or in any other Nation, according to the So-

lemnity

(a) Act 133. Parl. 8. Jam. VI.

lemnity of the Place (tho' different from what our Law prescribes) is sustained to transmit Moveables in Scotland.

4. A nuncupative Testament is, when the Testator doth by Word of Mouth only declare his Will. Such a Testament is of no Force in Scotland, for appointing an Excutor.

have the Use of their Reason, even Minors having Curators without their Consent, Persons interdicted, without Consent of the Interdictors, and married Women, without Consent of their Husbands. But Pupils, or Idiots, or furious Persons, during their Distemper, or Bastards not legitimated, nor having lawful Issue, or Power to make a Testament from the King, cannot make Testaments.

6. The Testator ordinarily names Tutors to his Children under Age, if he any has, and appoints one or more Persons called Executor or Executors Nominate, or Testamentary, for executing or performing his Will, by Payment of Debts and Legacies, &c. But a Testament is good, tho an Executor be not named by the Testator.

7. Moveables are the only Subject which can be conveyed by Testament, and the whole of them are term'd Executry, because they come under the Executor's Management. But all cannot be disposed of by the Testator. For the

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Ch. 6. Law of Scotland. Tit. 1. § 1. 107

the best of every Kind of Moveables belongs to the Heir of Line as Heirship, if the Tellator be one who by Law may have Heirship. Nor are always the rest of the Moveables wholly at his Disposal. A Woman, whether Maid or Widow, may inded intirely dispose of all her Moveables, without allowing any Part to her Children: And may, if she be married, freely dispose of her Share of her Husband's Moveables, without any Claim upon the same by her Husband or Children. But when a Man makes a Testament, his Power is greater or leser according to his Circumstances, at the Time of his Death. If he be married and have Children, Law provides to the Wife a Third of his Moveables, called jus relicta; to the Children in familia, another Third, called their Legitim, or Bairns Part of Gear, or Portion natural: And the Remainder of the Moveables is all the Testator can dispose of, thence term'd the Dead's Part. If there be either a Wife or Children, and not both, the Testament receives a bipartite Division, that is, the Wife or Children in Being, get one Half of the Moveables for their legal Share; and the other is reckoned the Dead's Part. If there be neither Wife nor Children, all the Moveables fall under the Denomination of Dead's Part. Mean time, it is to be noticed, that the Wife's Share of the Husband's Moveables, is not always so large, as the Children's Legitim, or the Dead's Part. For

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For personal Bonds bearing Annualrent, for Sums owing to the Testator, are esteemed heritable as to her, who has no Right to any Share of thefe, and moveable as to the Children, who may claim their natural Portion thereof, and as to the Legataries, and other nearest of Kin, who have Interest in the Dead's Part (a), unless the Testator die before the Term of Payment of Annualrent, or after a Charge, or Pursuit thereon for Payment, in either of which Cases personal Bonds, bearing Annualrent, are fimply moveable. But then, as the hath no Benefit by fuch Bonds granted to her Husband, neither is her Share of the Moveables affected with Debts of that Nature owing by him, while the Dead's Part and Legitim are fufficient to fatisfy the fame.

8. No Person can, by his Testament, or any Death-bed Deed, defraud the Heir of his Moveables, nor the Relict of her legal Share, or his Children of their Legitim. A Legacy left by the Testator to his Wife, is not imputed in Satisfaction of her legal Share, but is wholly due out of the Dead's Part. Nor is she excluded from this legal Provision, by a conventional Provision in her Contract of Marriage, not bearing expressly to be in Satisfaction of the Legal. A Legitim is not due to Grandchildren, but only to immediate lawful Children in their Father's Family at his Death, whether of the same, or of different Marriages. But Children are excluded from a Portion natural,

⁽a) Act 32. Parl. 1. Seff. 1. Ch. II.

by Forisfamiliation; which is understood, in this Case, either of an express Discharge of the Portion natural, or of Acceptance of a Provision in Satisfaction thereof. If some of the Children be so forisfamiliate, and others not. or provided to be Bairns in the House, latter will get the whole Legitim, and fall to the Parts of the former jure accrescendi (a).

9. Tho a Testator may dispose of personal Bonds, bearing Annualrent, as well as of his other Moveables, fuch Bonds feeluding Executors (which are heritable as to the Creditor. tho moveable as to the Debtor) do not fall

under the Dead's Part.

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10. The Executors Interest in the Testament

is set forth elsewhere (b).

11. The Dead's Part is ordinarily disposed of by way of Legacy. A Legacy is a Bequest or Gift, which the Testator orders to be given. or paid after his Decease, to the Person gratihed therewith, called Legatary or Legatee.

A Legacy is either universal or particular. An universal Legacy is a Gift of the whole Dead's Part, either in favour of the Executor, or some other Person. A particular Legacy, is a Gift of some Part thereof.

A particular Legacy is, 1. Either general, e conceiv d in general Terms, as a Legacy of a certain Sum of Money, without specifying the Person by whom it is owing; or special, i. e. a particular Thing given in Specie

a) Vid. infr. Sect. 2. (b) Vid. infr. Tit. 2.

Specie, as a certain Horse, or Piece of Plate, Oc. or a certain Sum owing to the Testator by such a Man. If the Testator bequeath any specifick Thing, which he knows to belong to another Man, or an heritable Sum belonging to himself, which he knew to be heritable; the Executor is bound to purchase it for the Legatary, or give him the Value of it. But if the Testator bequeath what belongs to another, supposing it to be his own, or an heritable Sum belonging to himself, thinking it moveable, his Executor is not obliged to make good the Legacy. 2. A particular Legacy, is either written, or nuncupative. A written Legacy may be left either in a Testament or Codicil, or in any other Writ, as a Contract, Ticket or Letter. And tho' none make effectually two Testaments, he may leave several Codicils And Legacies may be given, either in one, or in different Writs, of the same, or of different Dates. A nuncupative Legacy, left by Word of Mouth, within an hundred Pounds, or a greater, if restricted to that Sum, is fustained, and may be proved by Witnesses.

in the View that the Person who so disposes of his Goods, has of his own Death and with a Design that they shall have no Effect till after his Death; the Testator is always at Liberty to destroy and suppress them, or to revoke and alter them, by make ing

Ch. 6.

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ing another: In which Case, the last only is effectual; and thence term'd a Latter-will. Some things in a Testament, as Legacies, may be revoked or altered, without Prejudice to the Testament in other things. Legacies may become void, either totally, or in Part.

13. Legacies cease totally, 1. By the Teflator's revoking them, either expresly or tacitely. They may be revoked expresly in a separate Codicil. Legacies are revoked tacitely, by some Act of the Testator, from which his Intention to deprive the Legataries of them, is gathered. Thus a special Legacy of any corporeal Thing, is understood to be revoked, by the Testator's selling, or otherwise alienating it, and fuch a Legacy of a moveable Bond, is anull'd, by his taking a fubsequent heritable Security for the Sum therein. 2. A specifick Legacy is lost to the Legatee, when the thing perisheth without the Fault of the Executor. 3. A Legacy becomes null, if the Legatary die before the Teltator.

14. Legacies cease in Part only, when they exceed the Dead's Part of the free Gear: In which Case they regularly suffer a proportionable Desalcation, without Distinction even of Legacies to pious Uses. But a special Legacy will not be so abated, in a Competition with general Legacies.

15. Tho' a latter Will may commonly be

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revoked; yet if one, by Contract or other Deed, oblige himself to dispose of his Means so and so, or not to alter his Testament; in such a Case, his Will is irrevocable and unalterable. And an Obligement to leave a Leaguey, is sustained as an irrevocable Legacy out of the Dead's Part of the Granter's free Gear.

citely. They at v. Troged expectly in a leparate Codicil. Legeners are revoked tar

of Teftaments dative. and de giano

fion to the Moveables of one deceas'd without making a Teltament, by his prefumed Will, according to the Rules of legal Succession to Heritage, except as to the Particulars follow-

ing.

2. Where the Intestate left no Heritage but only Moveables, the distinguishing Rules are, i. All the nearest of Kin of one Degree, Males and Females, elder and younger, without any Distinction of Sex or Age, succeed equally to the moveable Estate. 2. There is no Right of Representation in this Succession. 3. A Woman's nearest of Kin succeed to her whole moveable Estate But a Man's nearest of Kin do not always succeed to all his Moveables, but only to the Dead's Part thereof, which falls to be more or less according to the Condition of his Family at his Death. For if he leave both a Wife

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Wife and Children in his Family, she will have Right jure relicta to a Third of all except perfonal Bonds bearing Annualrent; and they are intitled to the relt, including fuch Bonds, viz. to the one Half thereof as Children, for the Legitim, and to the other Half by Succession, as nearest of Kin, for the Dead's Part. Where the Deceas'd leaves a Wife and no Children, the gets a Half of the Moveables, excepting as aforesaid, for her legal Share, and the nearest of Kin the rest, without Exception, as the Dead's Part. If Children and no. Wife furvive the Deceas'd, these Children will enjoy the whole Estate, viz. one Half as their Portion natural, and the other, viz. the Dead's

Part, as nearest of Kin.

An Aliment is due to the Relict, for main= taining her and the Family of her Husband, till the next Term after his Death, when her Joynture commenceth: Albeit she have a separate Estate of her own sufficient for their Main= tenance, which is modified, without respect to her Joynture, according to the Quality of the Person, and Condition of the Family left by him. The Relict gets also the Expence of her Mournings for her Husband, if it was proper for one of her Quality to have Mourn-The Expence of which Aliment and Mournings affects not the Dead's Part only; but comes off the whole Head of the Executry: If a Wife die before her Husband, her Executors claim the like Share of the Husband

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ooth a Wife Moveables at the Time of her Death, as she could have had, if she surviv'd him, viz. a Third or Half, according as there were Children, or not Children, at the Time: And her Children by a former, will succeed equally with those born to the last Husband. But the Heirship moveable is excepted, wherein the Wife had no Interest; tho' there could be no Heir for the Time, the Husband being alive.

Moveables, the Rule of Succession to the Moveables differs in this, from the legal Succession to Heritage, that the Heir of Line may draw the Heirship Moveables, and the other nearest of Kin will succeed to the Dead's Part of the rest. But if the Heir be willing to collate, and let the other nearest of Kin share equally with him in all he can succeed to as Heir; he comes in pari passu with the rest. And if there be but one Child, who is both Heir and Executor, that Child is intitled, not only to the Heritage, but also to the whole Legitim, without Collation of the Heritage, for increasing the Relict's Share.

4. Having opened up the two Kinds of Succession to Moveables, and the several Shares thereof, belonging, by the Disposition of Law, to Heirs, Widows, Children, nearest of Kin, Executors and Legataries; natural Order leads me to shew what are effectual and complete Titles to the Moveables of one deceas'd.

Ch. 6.

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Heirship Children of the I transmit Death, Confirm

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TIT. II.

What are effectual and complete Titles to the Moveables of one deceas d?

1. TITLES to the Movcables of one deceased, are either effectual ip/o jure, by the Owner's Death, or must be made

up and completed by Confirmation.

2. An Heir hath Right to the moveable Heirship, a Widow to her legal Share, and Children to their Legitim, ipso jure, by Decease of the Predecessor, Husband, and Father; and transmit their respective Interests, by their Death, to their own nearest of Kin, without Confirmation.

3. Titles to the Moveables of Persons deceased, who made their own Wills, are persented by Confirmation, at the Instance of their Executors testamentary. Testaments of those who die intestate, or whose Executor nominate declines to confirm, are made up and completed by Confirmation, either, 1. at the Instance of their Relicts and Children, or other nearest of Kin. Or, 2. at the Instance of the Creditors of the Deceased. Or, 3. At the Suit of Creditors of his nearest of Kin.

4. Confirmation is the Sentence of a Commissary, authorizing and impowering an Executor testamentary, or an Executor appointed by himself to an Intestate, upon giving up

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Inventory of the Goods, Gear, Debts, and Sums of Money, belonging or owing to the Testator, or Intestate, to intromit with the said Goods and Gear, uplift, receive, dispose, and grant Discharges thereof, and to pursue for the same.

Commissariot, i. e. Commissary-court, where the Deceas'd dwelt at his Death, as his ordinary Abode; and if he had Houses in several Commissariots, before the Commissary of the Bounds where the chief dwelling Place lay. Testaments of Scotist Men, residing and dying Abroad in a foreign Country, ought to be confirm'd by the Commissaries of Edinburgh, Testaments of Mountebanks, Strollers, and common Soldiers, fall to be confirmed in the Place where they die, if they had resided there 40 Days before: But otherwise are to be confirmed by the Commissaries of Edinburgh.

SECT. I.

Confirmation at the Instance of Executors testa-

THE Executor nominate; gives up the Testament, with an Inventory of the Goods and Gear of the Deceas'd, to the proper Commissary, with a Bond of Cautionry to make the same forthcoming to all Parties having Interest, as Law will. Which Testament and In-

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and InInventory the Commissary, without more ado, ratifies, approves, and confirms, and impowers the Executor to intromit with, uplift, receive, dispose of, pursue for the Goods and Gear therein set down, and to grant Discharges upon Receipt or Payment. This is what we call a confirm'd Testament Testamentary.

SECT. II.

Of Confirmation of the Moveables of an Intestate, at the Instance of his Relief or Children, or other nearest of Kin.

nearest of Kin of an Intestate, cannot now (as before the Year 1690.) be charged, pursued, or required at the Instance of the Commissary or his Fiscal, to give up Inventory of the Moveables of the Deceased, in order to Confirmation (a). It is often necessary for Children, or other nearest of Kin, to confirm, because the Dead's Part falling to them, is not established in their Persons, by their surviving the Deceased without Confirmation, and only such nearest of Kin have Interest therein, as were alive the Time of the Confirmation, there being no Right of Representation in this Case.

2. When the nearest of Kin desire to confirm, upon their Application to the Commis-Hh 3 sary,

(a) Act 26. Seff, 2. Parl. W. and M.

fary, an Edict will be emitted, ferved, and affixed on the Church-door, where the Intestate died, upon Nine Days Warning to all Parties having Interest to confirm. Upon the Ninth Day, if no Person appear having a just Objection against the Applier's Interest, they will be decerned Executors. Which Decreet is called a Dative, and the Persons decerned are stiled Executors Dative qua nearest of Kin. To the end they may the better know the Extent of the Effects of the Deceased, in order to confirm, they may fue the Intromitters therewith, or others supposed to know the same, before the Commissary-court, to give up Inventory thereof upon Oath. After such Expiscation, if the Executor, or Executors Dative think it expedient to confirm, they give up Inventory, and Iwear the same, and find Caution to make Forthcoming to all concerned. Which Inventory now, fince Quotes of Tastaments were difcharged (a), confifts only of Two Parts, viz. 1. Goods and Gear, or specifick Things. 2. Sums of Money lying by the Deceased, and Debts owing to him. The Total is then drawn up, and either divided, or left undivided, according to the Condition and Estate of the Intestate at his Death. For if the Debts, owing by him, exceed his Goods and Gear, there is no Place for a Division. If there be an Overplus, that is divided into one, three, or two Parts, according as the Deceased had not, Ch. 6.

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or had a Wife and Children, or wanted either of these. To which the Commissary interpoles his Authority, and authorizeth the Executor to act as such; this is called a confirmed Testament Dative. But if, after the Lights got from the preliminary Process for Trial aforesaid, the Executor decerned expect not to find his Account in confirming, he may renounce and pass from the Office, and thereby make Way for Creditors to apply for it.

SECT. III.

Of Confirmation at the Instance of Creditors of the Deceased.

CREDITORS of Persons deceased have Two Ways of making up Titles to their Debtors Effects, and recovering Payment.

1. A Party, having a depending Cause, or Claim against one deceased, may, if he please, charge his nearest of Kin, to confirm within Twenty Days, in which Case he must either renounce, or be liable as a vitious Intromitter: And if he renounce, the Charger may proceed to have his Debt constitute, and the hareditas jacens of Moveables declared liable by a Decreet cognitionis causa. Upon which the Obtainer may be decerned Executor Dative to the Deceased, and so affect his Moveables in the common Form (a). Hh4

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(4) Act 41. Seff. 5. Parl. K. W.

2. Creditors of the Deceased, whose Debts are instructed by Writ, may directly, upon an Edict ferved, get themselves decerned Executors qua Creditors; and those, whose Debts are not so instructed, may, by pursuing a Constitution thereof, and obtaining a Decreet cognitionis caufa against the nearest of Kin, be decerned Executors Creditors. Upon which these Executors Dative may purfue all Perfons supposed to have, or know of their Debtor's Effects, to give up Inventory thereof upon Oath, and then, according as they fee convenient, confirm either the whole Goods and Gear of their Debtor, or only so much thereof as may pay themselves (a).

3. All who confirm themselves Executors Creditors, within Six Months of the Debtor's Decease, come in pari passu, without Respect to the Priority, or Posteriority of their Diligence: And a Creditor, posterior in Diligence, may, within that Time, get himself joyned to the Executor Creditor first decerned and confirmed, upon bearing a proportionable Part of the Charges wared out by the faid Executor Creditor (b). But where Two Persons successively confirm the same Subject, as principal Executors qua Creditors, the Second Confirmation

is null.

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⁽a) Act of Seder. 14 Nov. 1672. (b) Act of Seder. 28 Feb. 1662.

SECT. IV.

Of Confirmation at the Instance of Creditors of the nearest of Kin of one deceas'd.

WHERE Moveables fall to a nearest Kin, lying by without Confirming, his Creditors may either require the Procurator Fifcal to confirm and affign to them, under the Pain of being liable to them for the Debt; or may obtain themselves decerned Executors to the Deceas'd, as if they were his Creditors; with Preference always to the Creditors of the Deceas d, doing Diligence to affect the faid moveable Estate, within Year and Day of the Debtor's Decease (a).

Having spoke of the several Kinds of Confirmation of the Goods and Gear of Persons deceas'd, at the Suit of their Executors testamentary, Executors qua nearest of Kin, Executors qua Creditors, and of Creditors to their nearest of Kin; I propound in the next Place to fet forth some things accessory to all these Confirmations.

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SECT. V.

Some Things accessory to all the Kinds of Confirmation aforesaid.

. EXECUTORS use at the Time of the Confirmation, to protest, that they may be allowed to eik or add to the Inventory, what more comes thereafter to their Knowledge. Which Additions the Commissaries will admit, without a new Confirmation, provided it be done before ferving an Edict ad omissa:

2. If the Executor omit to give up any Thing in the Inventory, or do not give up the Moveables at the true Rates, the Commissary may appoint another Executor dative ad omissa & male appretiata. Who regularly ought to cite the principal Executor, if on Life, or his nearest of Kin, if deceased, upon Nine Days warning, to hear and fee him so decerned Executor: Otherwise the Decreet dative and Confirmation in his favour are null. A Testament ad omissa, &c. is confirmed in the same Manner as the Principal; except that the former receives no Division, and carries the whole Goods and Gear omitted to the Executor dative ad omissa, excluding the Relict or Children of the Deceas'd from their legal Shares, unless they be able to purge and clear themselves of a fraudulent Omission. 3. Because

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3. Because sometimes Debts owing to the Deceast are controverted, and the Executor is uncertain whether they will be effectual, a Licence to purfue is commonly granted to him by the Commissary, for trying, before he be at the Expence of Confirmation, what can be made of them, but not till once he is decerned Executor. Such a Licence may be granted not only to principal Executors, testamentary or dative, but also to Executors dative ad omissa. But it is indulged only ad diem, that the Executor may fue within a certain Time, or usque ad sententiam, or excludendo sententiam, that he may infift and carry on the Suit, till it is ripe for a Sentence. If a Licence be given includendo sententiam, or if the Sentence happen to be pronounced before outrunning of the Day, to which the Licence was allowed, the Lords ordain Decreet, not to be extracted, till the Pursuer produce a Confirmation, or find Caution to confirm. A Decreet extracted on a Licence, bearing the Quality of excludendo fententiam, before the Subject pursued for is confirmed, is null. But an Executor may pursue without a Licence, for a Debt unconfirmed, before the Commissary who decerned him Executor.

Having explained how the active Titles of Executors are made, I shall in the next Place consider the Essect of their being Executors, and the Interest they have thereby, which is either active or passive.

TIT.

TIT. III.

Of the active Interest of Executors confirmed.

Land-rent, or Mill-rent, of Property or Annualrent, do survive Whitsunday, or die in the Afternoon of the Term-day, their Executors have the Half of that Year's Rent, whether it consist of Money or Victual; and if they survive Martinmas, or die in the Afternoon of that Term-day, their Executors have Right to that whole Year's Rent, without regard to

the conventional Terms of Payment.

2. An Executor who is a Stranger (that is, one who has no legal Interest in the Moveables of the Testator) has by his Office a Third of the Dead's Part, after Deduction of Debrs and Legacies, for his Pains in executing the Testament (a). So that if the Testator hath made an universal Legacy of all the Dead's Part to another, or exhaulted it with particular Legacies, fuch an Executor hath nothing but an unprofitable Office. And even where so much of the Dead's Part is left free as would fatisfie the Executor's Third, any Legacy left to himfelf, is imputed in Payment thereof, pro tanto, without Prejudice to him of his Legacy, if it exceed the faid Third (b). The Heir, if named Executor, retains

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⁽a) Act 14. Parl. 22. James VI. (b) Ibid.

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reains tains his Third as a Stranger. But the Teflator's Wife or Children, or nearest of Kin when named Executors, have nothing for their Administration, but their Expences, unless their legal Interest be less than a Third.

3. The Executor only has the Power of dministration, and Right to pursue Debtors of the Deceas'd, and Intromitters with his Goods, against whom Legataries have no immediate Action; but only against the Executor: Except one to whom a special Legacy is left, who may purfue the Haver of the Thing or Sum specially bequeathed, provided he cite the Executor for his Interest in the Suit. If there be several Executors, whom we call Co-executors, one cannot purfue without the rest concurring, nor discharge a Debt wholly. But if any one of the rest decline to concur, he may be got excluded from the Office, in a Process before the Commissaries, and then Process will be sustained without him. A Discharge from one of several Executors is good, if the other Executors have got as much as their Share will extend to.

4. Executors may receive Payment of, or discharge Debts owing to the Deccas'd; but cannot dispone or assign, till they obtain Decreets, or new Security in their own Names. Nor doth a Sentence against the Debtors of the Decease, or Bonds obtained from them, state the Executors in the absolute Right to the Moveables, otherwise than that they may

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assign to the respective Persons having Interest; nor yet do the Goods of the Deceas'd established in the Executor's Person by a Sentence, fall under his Escheat, except as to his own Interest therein.

cd, when the Executor has obtained Payment or Decreets, or new Security in his own Name

for the Debts.

6. If one of several Executors die before the Testament is executed, the Office accrues to the Survivers. And if all the Co-executors, or a sole Executor die, while any Part of the Testament remains unexecuted, there is Place for a new Executor to be decerned for executing the Remainder, called Executor quoad we executa, who is accountable to these who were nearest of Kin at the first Confirmation. But in so far as the Testament was executed before the Executor's Death, his Share passeth to his Executor, with a Burden of a Proportion of the Debts of the first deceast.

TIT. IV.

Of the passive Interest of Executors confirmed.

A N Executor, who has only an unprofitable Office, and his Labour for his Pains, is liable only to affign the Subject of the Executry to those having Interest, that they Ch. 6.

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they may pursue, and is accountable only for supine Negligence: But an Executor, who has Benefit by his Office, is liable for exact Diligence; and Executors Creditors are obliged to Diligence for what they confirm.

2. Executors are liable to Creditors, the Relict, Children or other nearest of Kin, and Legataries, only secundum vires inventarii, so sar as the Moveables confirmed will go, and may be distressed by Creditors, both for heritable and moveable Debts, but get Relief from the Heir of all heritable Debts paid by them. Co-executors are accountable only pro virili parte, and cannot be singly pursued, unless one of them hath intromitted, or might have intromitted with as much as will satisfy the Debt in question.

An Executor cannot regulariter make voluntary Payment, without a Sentence for his Warrant, and all Creditors doing Diligence against him, within Six Months of the Debtor's Dearh, come in pari passu (a). But these pursuing after the Six Months, are preserred according to the Priority of their Diligence.

4. Some Debts may be paid without a Sentence. Of which some can only be voluntarily so paid, before any Suit commenced, or Diligence used against the Executor by other Creditors. Such are Debts acknowledged by the Deccased in his Testament. Other Debts may be said at any Time, even after Process against

⁽a) Act of Seder. 28. Feb. 1662.

the Executor, at the Instance of other Creditors: Such are those called privileged Deltaviz. Medicaments afforded to the Deceased on Death-bed, his suneral Charges, a Term's Rent of the House wherein he died, and Servants Fees for a Year or Term, according as they were hired. But Aliment of the Family of the Deceased, till the next Term after his Death, is no such privileged Debt, but only a common Debt, without any Preserence to others.

Pursuit against Executors, prove their Debts by the Oaths of the Executors, or by holding them as confest to the Prejudice of other Creditors or Legataries, or of the Reliet, Children, or other nearest of Kin. But such an Oath given by the Executor, or holding him as confest, is effectual only against himself, in so far as he may have Benefit by the Testament.

by Exception, that the Inventory is exhausted. For instructing whereof he may found, is Upon Debts due to himself before Consistantion, but not such as were assigned to him after Consistantion. 2. Upon privileged Debts paid at any Time, and testamentary Debts paid before Citation at the Instance of other Creditors. 3. Upon other common Debts paid by virtue of Sentences, according to the Order of Diligence done for them. 4. Upon Decreets and registred Hornings against Debtors of

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Debtors of of the Deceased, and upon Sentences absolvitory obtained by Debtors pursued by the Executor. 5. Upon the Expence of confirming the Testament of the Deceased, which is allowed out of the whole Head of the Executry. 6. Upon the necessary Expence of Process and Execution against the Debtors of the Deceased. But then, if the Executor has got any Eases of the Debts of the Deceased from some Creditors, he is bound to communicate the Benefit thereof to the rest.

7. An Executor's Defence, that the Inventory is exhausted by lawful Payments, is taken of by the Pursuer's Reply, that the Executor has super-intromitted, that is, intromitted with as much more of the Effects of the Deceased, than those contained in the Inventory,

s would pay the Purfuer.

8. If, after all just Allowances made to the Executor, he be found chargeable with northing save Debts unrecovered, for which he hath done competent Diligence; he will be exonered, upon assigning over these Debts to the Creditors, according to their Preserence.

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Of illegal and unwarrantable Succession to the Moveables of Persons deceased, called vitious Intromission.

1. VITIOUS Intromission is, any Person's taking into his Hands, and using the Goods of one dying intestate, without any Title thereto. Which is a passive Title subjecting the Meddler, called vitious Intromit-

ter, to all the Debts of the Deceafed. 2. In one Case vitious Intromission is prefumed, as if the Persons, related to one dying in his own House, present at his Death, or the Master or Mistress of another House where does not, after he becomes infensible, lock up the Places where his Writs, Evidents, Mouey, and other precious Move-ables are contained, feal, and deliver the Keys to the next Judge ordinary, to be kept, till opened, at his Sight, by those having best Right; they will be held and reputed as Embezillers, or Abstracters of his Writs, Evidents, Money, or precious Moveables. But, in case of Necessity, the Relict, or Children of the Deceased, may, at the Sight of the Judge or dinary, or Two Justices of Peace, take out so much of the Money, lying by the Deceased, upon their Receipt, as may defray the ExpenCh. 6.

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3. T cessary nor by though can any there 19 Decease some of But an ter's be this Re with fo which I ventory mation lar Deb Intromi from his a-Declar cludes v mitter,

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3. This passive Title is not inferred by neceffary Intromission, for preserving the Goods; nor by a Stranger's buying them from one he thought the Owner, for a just Price. Neither can any Person be a vitious Intromitter, where there is an universal Executor confirmed to the Deceased, whether it be the Intromitter, of some other from whom he derives no Right. But an Exception founded upon the Intromity ter's being Executor confirmed, is taken off by this Reply that the Executor intromitted with lome Part of the Goods of the Deceased, which he concealed, and kept out of the Inventory of the Tenament. And the Confirmation of an Executor Creditor, in a particul lar Debt or Subject, doth not hinder vitious Intromission, unless the Intromitter have Right from him before his Intromission (b). Again, a Declarator of the Escheat of the Deceased excludes vitious Intromission, whether the Intromitter, or another from whom he had no Warrant, be Donatary of the Efcheat. In thort, any colourable Title, tho not effectual; sufficeth to exclude vitions Intromissionique !!

4. Vitious Intromission once incurred by Relicts or Children, may be purged by confirming themselves Executors to their Husbands or Parents, within Year and Day of their Death.

(4) Act of Seder. 13 February, 1691. (b) Act 10. Sed. 6. Parl. K. W.

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Death, tho after these Relices or Children were pursued as vitious Intromitters by Creditors of the Deceased. But Super-intromission with Goods not given up in the Inventory, after Citation at a Creditor's Instance, is relevant to make the Super-intromitter universally liable. A Stranger who vitiously intromits, is exempted from this passive Title, by a subsequent Confirmation before (but not after) Action is moved against him by a Creditor of the Deceased. Vitious Intromission is also purged, by the Intromitter's obtaining afterwards a Gift of the Desunct's Escheat, or a Right from the Donatary before he is pursued as vitious Intromitter.

Title. If there be several vitious Intromitters, each of them are liable in solidum. But the Intromitter's Heirs or Executors cannot be pursued upon it, unless it was established against the vitious Intromitter himself, or, at least, Litiscontestation made in a Process against him compearing. In which Case his Representatives may be sued for Payment, or the Action may be transferred, and the passive Title proved against them.

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PARTIV.

The Ways of determining civil Controversies in Point of Right, or Possession, about Estates.

BOOK I.

ing to Law, or in a judicial Way, by Action in a Court of Juflice. I shall first treat of extra-

judicial Ways of ending civil Differences, and then fet forth the judicial Remedy by Action.

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CHAP.

CHAP. L

How Controversies are determined without Suit, or going to Law.

of all Parties.

ONTROVERSIES are so determined, either by Act of one of the Parties, or by the Act of all Parties.

2. By Act of one of the Parties, sometimes without, and sometimes upon the Precept of a Judge. A Person does himself Justice without Order of a Judge. 1. By exercing his Right of Hypotheck, or Retention of another's Goods, till somewhat due to him, by the Owner, is paid. 2. By poinding brevi manu (a). Persons right themselves summarly by order of a Judge, before a Cause is tried at Law, in several Cases mentioned in another Place (b).

3. Debateable Rights, or Law Suits are fettled, or prevented by mutual Confent of all Parties in an amicable Manner, either by

palicies Ways of ending civil Differences, and

ther let forth the judicial Remedy by Action.

Transaction, or Submission.

TITLE

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TRANSACTION is, an Agreement betwixt Two, or more Persons at Variance, who adjust their Differences, by yielding up Part of their Pretences on each Side, for preventing or ending a Law Suit.

2. To found a Transaction, 1. The Subject transacted must be a doubtful Right or Suit. For when Persons come to an Agreement, by clearing the Point binc inde, without any Uncertainty about the legal Import thereof, that is, no Transaction, tho either Party abridge their Claim, and the Trouble of a Process be thereby evited. Nor is a Decreet in fore the proper Subject of a Transaction, unless it be liable to Reduction upon the account of Informality, or Nullity, or other ways. Something must be abated by the Parties on both Sides.

3. Transaction is of that Force, that it cannot be annulled upon any Prerence of Damage, which one of the contracting Parties fuffers thereby, or that he was drawn into it by fraudulent Motives, unless he was deceived in the Substantials commun'd upon. Nor is it to be loofed, because of Error or Mistake, not fab-

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stantial, but only circumstantial, or upon the account of new Evidents or Writs discovered. But if a Transaction has been entred into upon forged Writings, which passed for true ones, it may be annulled, when the Forgery is discovered.

TIT. II.

Of Submiffions.

SUBMISSION is, a mutual Obligement of Two or more Persons having a Difference with one another, to refer the ending thereof to the Determination of some certain Person or Persons without publick Authority, and to stand to such Decision, under the Pain of a Penalty to be paid by the Contravener, to the other who is willing to observe it.

2. The Person or Persons authorized to decide betwixt the Parties, are called Arbiters or Arbitrators. According to the Humour of Parties, one, two or more are so authorized. Sometimes an Oversman or Umpire, in case of their Variance, is named by the Submitters; and sometimes the Arbitrators are expresly impowered to chuse him.

3. A Submission is, 1. Either general of all Demands whatsoever, or special of some certain Matters in Controversy. 2. It is either verbal, or written.

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or reful they ha to deci by the 4. In the Case of a verbal Submission, it may be proved by either Party's Oath that he did submit, and by the Oaths of the Arbitrator or Arbitrators, that he or they did determine.

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5. A Submission in Writ should authorize the Arbitrators to do all Things necessary, as to appoint Time and Place of Meeting, examine Witnesses, take Oaths of Parties, and decide in the Matters submitted. It frequently expresses a Day betwixt and which final Sentence is to be given, bears a Confent to Registration, not only of the Submission, but alfo of the Decreet to follow thereon: For otherwise summary Diligence by Horning cannot be railed on such a Decreet, to force the Parties to give Obedience. The Parties must fign the Submission, and also do ordinarily subscribe a Blank on the Back thereof, to be filled up by the Sentence of the Arbitrators: But their figning fuch a Blank, is not necessary. The Arbitrators do also fign the Submission with the Parties, in Token of their Acceptance, but ought not to subscribe the Blank indorsed, till their Sentence be filled up therein.

6. A Submission fine die, lasts only Year and

Day, after the Date thereof.

7. Albeit it is free to Arbitrators, to accept or refuse a Submission made them; yet after they have once accepted, they may be forced to decide by Letters of Horning, issued forth by the Lords upon a Bill. Such Letters are

alfo granted against Witnesses refusing volun-

tarily to appear before the Arbiters.

8. The Sentence of the Arbiters is called a Decreet arbitral. Which may be either indorfed on the Submission in the Blank signed by the Parties, or be writ in a Paper apart. It must be subscribed by the Arbiters before Witnesses, and the Writer and Witnesses mult be named and defigned. A Decreet arbitral must be in the very Terms of the Submission, in respect of the Persons and Things submitted, and put a final End to the Controversy; and must be pronounced before the Time expressed, or prefumed in the Submission, be expired, otherwife it is null, and reducible as ultra vira compromiss. But a Decreet arbitral proceeding upon a fubscribed Submission, pronounced in the Terms thereof in due Time, cannot be reduced for any Caufe or Reason whatsoever, except upon Corruption, Bribery, or Falshood in the Arbiters (4) and I m seine I out this armight now to fabricine the Blank indorfed.

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(a) Act of Reg. 1695. Art. 25.

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Of Actions in general.

A CTION is taken either for a Faculty. In the first Sense it is defined, a Right of prosecuting in a Court of Justice, for what is one so Due. In the last, Sense it is, a Prosecution or legal Demand of one's Right, in order to a judicial Trial or Determination thereof. He who brings the Action is called the Pursuer, and he against whom it is brought called the Defender.

2. Action proceeds on a Summons issued orth under the Signet. Which Summons is either common, or privileged. A common Summons is, that which is raised without a Warrant from the Lords. A privileged Summons is, that which requires a previous Bill to the Lords to warrant the raising of it.

3. A Summons is raised in the King's Name, lirected to Sheriffs in that Part, and Messengers. It sets forth the Pursuer's Title, and he Ground whereupon the Desenders are li-

able

able to pay or perform what is craved: That which is commanded to be done, (called the Will of the Summons) is to cite the Defender to compear before the Lords of Session. The Defender in a common Summons, not instantly verified by Writ, mult, if within Scotland, be cited personally, or at his Dwelling-place, upon Twenty one Days Warning, except the Inhabitants of Orkney, who are to be cited upon Forty Days (a), for the first Diet, and upon Six Days for the Second, except the Inhabitants of Edinburgh, who may be cited upon Twenty four Hours, for the Second Diet (b). Those out of Scotland are to be cited at the Market-cross of Edinburgh, Pier and Shore of Leith, upon Sixty Days for the first Diet, and Fifteen for the Second. Which Citation to both Diets is allowed to be given at the same Time (c). But one Diet of Six Days fufficeth in Summonfes to be instantly verified by Writi Privileged Summonses contain also but one Diet. In some whereof Citation must be given to that Diet upon Twenty one Days, in others upon Fifteen, and in others upon Six (d). Such Citation is ordained to be given with Certification, that is, an Infinuation of what the Lords will do, if the Defender fail to appear. Which Certification is either general, that the Lords will proceed to do Justice, as it

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July 1672. (6) Act 12. Seff. 4. Parl. Will and Mary. (6) Act of Seder. 31 Act of Sed. 21 July 1672.

he did appear; or special, which varies according to the Nature of several Kinds of Summonfes. Tho ordinarily the Matter of Fact be fet forth before the Will of a Summons; some Summonses, as those of Reduction, of Spulzie, of Ejection, of Declarator, of Nonentry, oc. begin at the Will, and then proceed to the Purfuer's Interest.

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4. A Summons must be executed or serv'd against the Defender, by a Messenger at Arms; who gives to him, if personally apprehended, or leaves for him, if absent, at his Dwellinghouse with his Wife, Child, or Servant, if he get Entry, a short Copy of the Summons subscribed by the Messenger (a), or affixes it on the Gate after Six Knocks, if he get no Accels (b). Which Copy is called a Citation. testation given by the Summoner to his Employer, of what he hath done in ferving the Summons, is term'd his Execution. Which must be subscribed by the Messenger and Witnesses thereto (c), and express the Names and Defignations of Pursuer and Defender (d), otherwife tis null.

5. If a Summons be not executed within Year and Day after its Date, it prescribes, and nothing can be done thereon. When duly executed, and called in Judgment, the Purluer repetes his Libel, and the Defender makes his Answers, called Defences. Whereof some

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V. (c) Act 139. Parl. 12. Jam. VI. (b) Act 75. Parl. 6 Jam. VII. (c) Act 4 Seff. 2. Parl. Jam. VII. (d) Act 6. Parl. 2. Seff.

are properly term'd Objections, and fome Exceptions: Tho commonly any Answer to the Libel is called an Exception's and any Answer to that Answer is term'd a Reply, Oc.

A Defence is either dilatory or peremptory.
A dilatory Defence bars the Action for a Time.
Dilatory Defences are divided into Declinators and Dilators, specially so called.

A Declinator is an Alledgance, that the Judge is either incompetent to determine in fuch a Cause; or ought not to do it, because he is justly suspected of Partiality. Incompet tency of a Judge is founded, it. Upon the Matter's not being under his Cognizance, because of the Nature of the Action (a) 2. For that the Defender dwells not within the District of fuch a Judge, or is exempted from his Junidiction, by special Privilege. But this Ground of Declinator doth not ly against the Lords of Session, who have Jurisdiction over all Sur land. 2. A Judge is incompetent upon just Sufpicion of his Partiality, arising 1. From his Relation to either Party. The Lords of Sellion may be declined in the Causes of their Father, Bro ther, or Son (b), or of their Father's Brother, or Son in Law, or of their Uncle or Nephew (c). A Judge cannot be declined, upon the account of Confanguinity or Affinity, whole Relation is the fame to both Parties I Not can he be declined, because of his Relation to

(a) Vid infr. B z. Chap. 1. Tit 1. Sect. 1. (b) Act and Park 14. Jam. VI. (c) Act 13. Park 3. Charles II.

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the Member of a Society, College or Corporation, in a Cause at the Instance of, or against such a Society. 2. A Judge is suspected of Partiality, when he is interested in the Cause, either directly, when in the Event thereof, he will lose or gain; or indirectly, si fewer consimilem causam, if he hath a Cause in the same Circumstances depending, or hath taken a Bribe by himself, his Wife, or Servants, or given partial Counsel in the Cause; or being a Lord of Session, hath suffered himself to be solicited in favour of either Party, without shewing the same to the Lords in Presence (a).

Dilators specially so called, may be founded, 1. Upon wrong Steps in the Form of proceeding, or upon Informality in the Summons.

2. Upon the Pursuer's not having personam standi in judicio, because he is a Minor wanting the Concurrence of his Tutor or Curator; or for that he lies registred at the Horn.

A peremptory Defence excludes the Action for ever. Such Defence is made against the Validity of the Pursuer's Title, or the Instructions thereof; or against the Relevancy or Verity of the Libel: A Libel is said to be relevant, when the Fact therein set forth, if proved, will in Law infer the Conclusion libelled.

cd, will in Law infer the Conclusion libelled.

The Purfuer replies to the Defences and Exceptions. To whom the Defender duplies.

The Purfuer again triplies, and the Defender quadruplies, Oc. So long as the one hath

(a) Vide Part 3 B. I. Curp (

(4) Act of Sed. 6. Nov. 1677.

any thing to advance for supporting his Libel, and the other his Defence, which is cal-

led the pleading of a Cause.

Seeing the Matters of Dispute and Trial in Actions, are the Relevancy and Proof of what is alledged, or founded on by the Parties on both Sides; I shall first touch the refevant Alledgances common to all or many Actions (these peculiar to particular Actions being considered in their proper Places) and then treat of Proof; and lastly of Sentences of the Judges.

SECT. L

Exceptions common to all, or many Actions.

Exceptions common to all Actions are, 1. Exceptio rei judicata, that is, that the Controversy is already decided by Decree of a competent Judge, betwixt the same Parties, associations from the Conclusion libelled, upon the same media concludendi. 2. Exceptio litis contestata, in the same or any other Court. 3, Prescription (a). 4. The Pursuer's acknowledging or approving the Desender's Right, either directly and expressly by Consent thereto, or Ratisfication thereof; or indirectly and tacitely, by Deeds of Homologation. 5. Exceptio fals, which is the last, after which no other Exception lies.

2. The common Exceptions in Actions up-

(a) Vid. Part 3 B. L. Chap 5.

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on personal Rights, are i. Pactum de non petendo simpliciter, or a Promise never to insist for Payment. 2. Payment or Performance made to him who had Right to discharge, or bona side to him, whom the Defender had Reason to think to be the Creditor, tho he was divested in savour of another, which the Defender did not know (a). 3. Exceptio doli mali: 4. Exception of Error in the Substantials of a Bargain. 5. A Discharge of the Debt pursued sort 6. Confusion. 7. Compensation.

SECT. II.

Of Proof, or legal Evidence,

PROOF in general is, an Act which perswades the Mind, and creates a Belief in the Judge, that such a Fact is true or falle. Fact is the only subject Matter of Proof; for the Law is not to be proved, but only to be alledged. Proof is either particular and ordinary; or general and extraordinary:

Ordinary Proofs

i. THE ordinary Means of Proof, with us, are Writ, Witnesses, Oath of Party, and Confession, called inariskial Proof. Which are sometimes joyntly, and sometimes separately K k

(4) See Part &. B. 3. Chap. 3. Tit: #

made use of, for proving one Point. Some Points can be proved only scripts or juraments, by Writ or Oath of Party; others are allowed to be proved prout de jure, as accords of the Law, that is, by all the Means that Law allows, viz. Writ, Witnesses, or Oath of Party, as the Pursuer shall be served.

2. Proof by Writ, is either by publick, or

private Writ.

3. Publick Writs are those under the Hands of Persons in some Office of publick Trust, as Acts and Deeds under the Hands of Clerks, which prove what was done by the Judge, or alledged by the Party, but not that the Allegations were true, except in so far as they mention the Instructions; Instruments of Notaries, which are the only Proof of the Personance of some Solemnities of Law; and a Messenger's Execution in civil Matters, which is always believed till it is improved as salse.

4. Private Writs are those under the Hands of private Men, whether holograph, or only subscribed by them. But unsubscribed Writs are reckoned only as incomplete Deeds departed from by the Party; except Account-books, which prove against the Owner, if they con-

tain a long Tract of his Affairs.

Infection thereof, are 1. That the Body of the Writ, and Subscription of the Party and Witnesses, appear to be one and the same Hand of Writ. 2. That it wants some of the Essen-

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Essentials of such a Writ (a). 3. That it is vitiated in substantialibus, by Deletion, scoring, razing, cancelling or Super-induction. 4

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6. A Witness is a Person called in to a Court of Justice to declare upon Oath, to the Judge, what he knows of the Fact under Examination. His Declaration is called his Testimony, to distinguish from extrajudicial Oaths, which, tho' written, are reckoned only as Testificates, and ferve to instruct Matters of small Consequence, as for procuring an Advocation, Commission to depone in the Country, or to adminiculate and support other Evidence in Matters of Antiquity. Our Law doth not regard Proof by Wirnesses in Cases where Writ ufeth to be adhibited; as the borrowing of Money, or in a Bargain agreed to be reduced in Writ, or where Writ is an effential Solemnity. doth it allow Promises, tho' of small Value, to be proved by Witnesses; nor Legacies exceeding 100 L. to depend upon their Testimomonies. Sometimes Four, sometimes Three, and in all Cases Two Witnesses, at least, are required to make Faith in Scotland. An affirmative Witness proves more strongly, than a negative Witness. Instrumentary Witnesses are more pregnant than common Witnesses, and great Weight is laid upon the causa scientia, the Reason is a Witness's Knowledge.

7. Oath of Party is distinguished, 1. Into an Oath of Verity, and an Oath of Credulity.

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⁽⁴⁾ Vid Part 2. B. 3. Ch. 1. Tit. 6. N. 6. & feqq.

8. An Oath of Verity is that which positively affirms what is sworn to be true. An Oath of Verity is either necessary and suppletory, or voluntary and decifive. A necessary Oath of Verity is, that which is given by the Judge to either Party, upon half Proof already made, even in favour of himself, to supply the same. A voluntary Oath is given by the one Party to the other, when the former, being unable to prove his Charge or Exception, offers to stand or fall by the Oath of his Adversary. But sometimes the Adversary refers the Matter back to the other's Oath. In which Cafe the Judge determines, which of the Two should depone, and generally puts the Oath to him, who probably had most Occasion to be clear in the Matter. An Oath of Verity is, 2. Either simple, or qualified. A qualified Oath is that, which acknowledges what is referred thereto, but contains Circumstances and Conditions, or other Qualities adjected to the Matter of Fact offered to be proved by Oath. Some of these Qualities are intrinsick, i. e. necessarily implied in the Bargain, or a Part of it. Other Qualities are extrinsick, having no necessary Connection with the Bargain, but extraneous thereto. The Oath is sustained to prove an intrinsick Quality: But an extrinfick Quality resolves into a Defence, which must be other ways instructed by the Deponent. An Oath of Verity cannot be required upon a Fact, which, if proved, would infer a Crime, Ch. 2.

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Ch. 2. Law of Scotland. Tit. 1. § 2. 149

or Infamy against the Deponent, except in the Case of Usury. A Sentence proceeding upon an Oath of Verity cannot be reversed, even when the Swearer is, in a criminal Action, sound to have perjured himself, tho the Swear-

er may be punished.

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9. An Oath of Credulity is, when the Swearer doth not affert the Verity of the Matter of Fact, but only the Verity of his Belief that the same is true. Which Oath, tho it may so far terminate the Plea, as to bar him who hath fworn to infift contrary to his Beliet and Perswasion, doth not hinder the other Party to use afterwards, the other habile Proof by Writ or Witnesses, for instructing his Alledgance. Under Oaths of Credulity I comprehend, 1. An Oath given to the best of one's Memory, or to the best of his Knowledge. 2. Oaths in litem allowed to Pursuers in some Actions for estimating their Damages. 3. Oath of Expences or Costs, whereby the Party, who gains a Cause, is allowed to swear upon the Charges necessarily expended by him in the Profecution of his Suit. 4. Oaths of Calumny, which may be proposed in these Terms, whether or not the Deponent believes, that there is more Probability for the Truth of the Point alledged, than against the same (a). A Party's Oath of Calumny cannot be required upon his own recent Facts, but only upon his ancient facts, where the Actor might have for-Kk3 got

⁽a) Act 125. Parl. 9. James I.

got (a). Peers are not bound to swear de calumnia, but only to answer upon their Honour.

prefumptive. A real Oath is a Party's actual or real Affirmation, or Denial of something, calling God to witness the Truth thereof. A presumptive Oath is, when a Person cited personally, refusing to depone upon what is referred to his Oath, is held as confest upon the Verity thereof. In which Case, Law presumes he will not depone, because he is conscious of the Truth thereof.

11. Confession is either judicial, or extrajudicial. Judicial Confession, or that made in Judgment, accepted by any having Interest, makes sufficient Faith against the Confessor in all Things. Such Confession before the Lords of Session, needs not to be subscribed : But if made before an inferior Court, must be figned by the Party, or, if he cannot write, by the Judge. This Confession is, either express, TaciteConfession is, when a Party, refusing to confess or deny, is held as confest (b). Extrajudicial Confession, made industrioully to discover the Verity of what is confesfed, is sustained in civil, tho not in criminal Courts, if proved by Writ, or Oath of Party. But such Confession emitted upon some other Defign, than to prove the Truth of what is acknowCh. 2.

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⁽a) Act of Seder. 13 January, 1692. (b) Act of Seder. I February, 1715.

Law of Scotland. Tit. 1. 62. 151

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acknowledged, is commonly held not probative.

Extraordinary Proof.

EXTRAORDINARY Proofs are these following.

1. Where the Truth of one Point of Fact is inferred from another, called artificial Proof.

2. Proof by Notoriety of the Fact, when the Judge knows that such a Thing is publickly known, or acknowledged to be true by the whole Vicinity, tho not by all the Nation; or fees and hears it done presently before him in Judgment. For tho a Judge ought not to determine upon his own private Knowledge, his Know-

ledge of the Notoriety sufficeth.

3. Presumptions are conjectural Evidence upon a doubtful Matter, from probable Arguments. A Presumption is either of Man, i. e. the Judge, or of Law. A Presumption of Man ariseth wholly from the Discretion and Penetration of the Judge, who draws it from probable Circumstances of the Fact, without any express Law to direct him. Presumptions of Law are either juris, of Law simply, or juris & de jurc, of and by Law. A Prefumption of Law is, what the Law or Cultom holds to be true, till the contrary appear by politive Proof. Such are the Prelumption of Property in Moveables from Possession; that a Debtor doth not gift, Oc. A Presumption Kk4

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of and by Law is, what Law vehemently prefumes done or not done, and founds it self upon, as a Rule of Truth. Such are the Prefumptions that a Gift of Escheat is simulate, because the Rebel's Wife, Bairns or Friends, are suffered to possess the Escheat Goods to his behoof; that a Person held as confest for not deponing upon a Point referred to his Oath, declined to do it, because he could not deny the same, Oa

4. A Presumption differs from a Fiction, in so far as those Things are presumed, which are thought to be true. Whereas a Fiction is a Supposition of Law, that something really is, which certainly is not; as when an Heir is seigned to be the same Person with his decease.

Predecessor, Oc.

SECT. III.

Of Sentences.

Controversy between Litigants. And it is either interlocutory, or definitive.

where the Judge decides some incident Question arising upon the principal Cause: Of which

Nature are Acts of Process.

3. A Sentence definitive is, that whereby the principal Cause it self is determined as to that Instance or Action, or as to the Ground of Suit,

Ch. 2.

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Ch. 2. Law of Scotland. Tit. 1. 9 3. 153

Suit, called a Decreet or Decerniture. Such a Sentence is either condemnatory, when the Defender is condemned, or absolvitory, when he is assolved or acquitted wholly, or in Part, simply or with a Quality. A Decreet, at pronouncing whereof either Party is absent, is called a Decreet in absence; and one pronounced where both Parties compear, is term'd a Decreet in foro.

4. When any Sentence, whether interlocutory or definitive, is pronounced, the Clerk puts the same in his Minute-book, and also causes enter it in the general Minute-book. The Sentence may, Twenty four Hours being elapsed after it is read publickly in that general Minute-book, be extracted, if no Stop be put thereto, and no Scroll or Copy thereof be demanded by the other Party. But if he demand from the Extracter a Scroll of the Decreet, and give him Money for writing the Scroll, the Decreet cannot be given out till Twenty four Hours after Delivery of the Scroll. During which Time he may apply to get any Thing amiss in the Scroll rectified; and if the Decreet be unwarrantably extracted, may, upon a fummary Complaint to the Lords, get it recalled and returned to the Clerk's Hands.

Payment of Money, or Performance of any Deed, contains a Warrant for Letters of Horning, and other legal Diligence to be raised. A Decreet in foro in the Session, being once

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fairly extracted, becomes res judicata, not to be overturned upon Iniquitiy, or upon Grounds proponed and repelled, or competent to have been proponed, and omitted in the Plea.

TIT. II.

Of the Several Kinds of Actions.

A CTIONS are several ways divided, and subdivided. They are distinguished into civil and criminal Actions. Civil Actions are those, whereby Men pursue their civil Rights. Criminal Actions are those, by which Offenders are brought to publick Punishment, which are to be treated in the Second Volume of this Institute: My Design here being confined to civil Actions before the Session.

Civil Actions are brought before the Court of Session, either in the first or second Instance. Actions in the Second Instance are Advocations of Causes from inferior Courts, Suspensions,

and Reductions of Decreets (a).

Actions in the first Instance are either ordinary, or extraordinary. Ordinary Actions are those which are entred in the long Rolls, and come in to be called according to the Course thereof. Extraordinary Actions are those which proceed summarly, without going to the long Roll: Such as Actions of Sale of bank-

(a) Vid infr. B. 2. Chap. 2. Tit. 2. Sect. 2, 3 and 4.

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Ordinary Actions in the first Instance are either principal, or accessory.

TIT. III.

Of principal ordinary Actions in the first Instance.

PRINCIPAL Actions are independent Actions, pursued without Regard to others.

Such principal Actions may be confidered, in Either as personal, or real, or declaratory. Personal Actions are those, which are raised upon a personal Obligation, and competent only against the Granter, and his Heirs or Executors. Real Actions are such as spring from heritable Rights of Lands or Tithes, or whereby such Rights are sought to be affected, and ly against all singular Successors.

Principal ordinary Actions may be distinguished, 2. Into declaratory, rescissory, petitory, and possessory Actions.

SECT. I.

Of declaratory Actions.

DECLARATORY Actions, ordinarily term'd Declarators, are those wherein (with-

(4) Vid. Sup. Part 3. B. 1. Chap. 2. Tit. 6. Sect. 4.

(without any personal Conclusion against the Defenders) the Pursuers Rights are only declared; upon which Declarators they may raise

petitory Actions.

A Declarator may be raifed upon any Point of Right or Possession. In which the Pursuer does call any Person he thinks may probably quarrel his Right; and may cite apparent Heirs, without charging them to enter Heirs, to hear and fee it found and declared, that he hath fuch a Right.

common declaratory Actions being handled in their proper Places, I shall here only name them, which are these following.

1. Declarators of Property which are, 1. Declarators of irredeemable Property, under which I comprehend Declarators of Expiration of the Legal, Reversions of Apprisings, or Adjudications. But in place of other Declarators of irredeemable Property, Reductions and Improbations, as more effectual Actions are commonly raised. 2. Declarators of redeemable Property, which are, I. A Declarator of Redemption of a Wadfet, or of an Apprifing, or of an Infeftment of Annualrent. 2. A Declarator of Truft.

2. Declarators of Superiority, as 1. A Declarator of the Superior's Tinfel of Superiority, by failing to enter his Vassal. 2. A Declarator of Nonentry. 3. A Declarator of liferent Escheat. 4. A Declarator of the Avail of Marxiage. 5. A Declarator of Recognition. 3. De-

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and of Bastardy.

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4. Declarators of Services, and of Exemption from Services, fuch as those come in place of the Actions confessoria & negatoria in the civil Law, and Declarators of Astriction, or of Exemption from Thirlage.

5. Declarators of Clauses irritant in Rights: Which Irritances may be also purfued in Reductions containing declaratory Con-

clusions.

6. Some Actions are called general Declarators, others special Declarators, v. g. When a Person is found to have been lawfully denounced to the Horn, and his escheatable Goods declared to belong to the Donatary by Decreet of the Lords, this is called a general Declarator of Escheat. Afterwards the Donatary may pursue for Exhibition and Delivery of these Goods, or Payment of Sums owing to the Rebel, which is term'd a special Declarator of Escheat, tho very improperly, seeing it is simply a petitory Action. The like may be observed of general and special Declarators of Nonentry. Sometimes both such Actions of general and special Declarator are, for the more Expedition and Dispatch, rais d in one Summons. Again, there are Actions which, tho they don't bear the Name of Declarators, are yet of a declaratory Nature: As Actions to infift, with Certifitification not to be heard hereafter; Actions of double or multiple poinding; and Actions cognitionis causa, against apparent Heirs.

SECT. II.

Of rescissory Actions:

RESCISSORY Actions (which we call Reductions) are those whereby Persons, aggrieved by some Acts or Deeds, to which they were Parties, crave Rescission of such Deeds, or Restitution of Things to their first Estate, for a just Caule, that they may be in the same Condition they were in before such Acts or Deeds. The particular Grounds of Rescission, or Reasons of Reduction, are multifarious, but the most ordinary are Reduction ex capite inhibitionis, ex capite interdictionis, ex capite lecti, ex capite metus, ex capite doli; upon the Act 1621. anent Bankrupts, and Action of Err ror; all which are explained in their proper Places. I proceed therefore to fet forth the Nature, Steps, and Formalities of an Action of Reduction.

Reduction is pursued, either in the first Instance, when Bonds, Contracts, Dispositions, or other extrajudicial Deeds are sought to be reduced; or in the Second Instance, for reducing and annulling Decreets, or other judicial Deeds. I propound here to treat of Reduction in the first Instance, and afterwards (a), to Ch. 2.

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⁽a) Vid. Inf. B. 2. Ch. II. Tit. 2. Sect. 4.

Ch. 2. Law of Scotland. Tit. 3. \$ 2. 159

take Notice of the Specialities of Reduction in the Second Instance.

Sometimes a simple Reduction only is raised, sometimes a Reduction and Improbation, and sometimes a Declarator is annexed to either.

A simple Reduction.

1. A fingle Reduction contains, r. An Order to cite the Persons concerned in the Writs to be reduced, to compear at the Instance of the Pursuer, as having Right so and so, and bring with them such Writs to be reduced for such and such Reasons, with Certification, that it the Writs called for be not produced, they shall be held as null, till they be

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2. The Pursuer may call for any particular Rights granted by him, or his Predecelfors or Authors, to the Defender, or to his Predecessors or Authors. At the calling of the Cause, the Pursuer craves, that the Desender may take a Term to produce the Writs called for. It is a relevant Desence, that such Writs are in publica custodia, that is, in the Registers of the Session or Chancery, and the Desender condescends on the Dates of the Registration. But such a Condescendence upon Writs recorded in inserior Court Books, will not relieve the Desender of the Necessity of producing the Extracts. There is only one Term

allowed for producing; for which an Act, called an Act for Production, is extracted.

3. At calling of which Act after elapsing of the Term, if none of the Writs called for, or only some of them be produced, Certification is granted contra non producta. But Certification can be granted only against Writs, of which there is a relevant Reason of Reduction libelled. Therefore general Reasons against all the Writs called for, as their being vitiated in substantialibus, wanting Writer and Witnesses, &c. are at first libelled, and after the Production is satisfied, the Pursuer is allowed to add special Reasons against the Writs produced.

4. It is a relevant Defence against Certification contra non producta, that the Defender hath produced Rights sufficient to exclude the Pursuer's Title. And if, after hearing of Parties, it be found, that the Defender hath not produced sufficiently, he may make a farther Production, and dispute upon it. But he will not be heard thereafter, to dispute upon any farther Production, till the Production be closed, either by the Pursuer's holding it satisfied, or by a Decreet of Certification contra non producta.

whom the Act is called, makes great avisandum with the Reasons of Reduction, according to the Date whereof, the Cause is put in the inner-house Roll of ordinary Actions, to be difficults d

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cuss'd in Presence: Unless the Lords, upon a Bill, remit to the Ordinary in the outer House, to discuss the Reasons extra, which is commonly done,

Reduction and Improbation.

1. A Reduction of land Rights is seldom raised, without an Improbation joyn'd with it.

2. A Summons of Reduction and Improbation is, expede upon a Bill, having the King's Advocate's Concurrence.

The Pursuer in this Process may call, not only for particular Rights, but for all Writs in general granted by him, or his Predecessors or Authors, to the Defender, or his Predecessors or Authors. Two Terms are allowed to the Desender for producing: And Acts of Production may be extracted for either of these Terms.

3. The Act for the second Term is to be call'd judicially among other Acts, in order to intimate to the Defender's Procurators, to satisfie the Desire thereof, betwixt and a certain Day to be appointed by the Ordinary, not exceeding ten Days, which Intimation is marked on the Act, and subscrib'd by the Ordinary (a). An Extract out of the Books of Session or Chancery, will satisfie the Production, but an Extract out of the Register

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(a) Act of Seder: 1 January, 1709;

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of any inferior Court will not, without pro-

ducing the Principal.

4. The Certification in an Improbation is, that the Writs call'd for, shall not only be declared null, but also be held and reputed salse and forg'd, and make no Faith in or out of Judgment. Nor is it necessary to libel any other general Reason before Production. A Decreet of Certification, tho' in Absence, once fairly extracted, if not recently quarrelled, will hardly be reduced. But then it is of Force only to secure the Rights and Titles, the Process was sounded on: For the Writs, against which it is granted, may be still made Use of against any other Party than the Obtainer of the Certification, or against other Rights belonging to the Obtainer.

5. If the Writs call'd for be produc'd, and the Pursuer incline to improve them, he must previously consign 40 L. as a Penalty, in case he succumb. And the Defender must subscribe, that he abides by the Verity of them, upon Pain of Falshood, otherwise they will be held as forg'd, from a Presumption that he dares

not own them as true Deeds.

6. There are two Ways of improving a Writ, viz. the direct and indirect Manner. The direct Manner of Improbation is, by the Testimony of the Writer and instrumentary Witnesses. The indirect Manner is, by strong Presumptions and Conjectures arising a comparation literarum; or from the Circumstances of

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of the pretended Subscriber or Witnesses, as that they could not write their own Names, or were alibi at the Date of the quarrelled Writ. Which indirect Manner of Improbation is not allowed, unless the direct Manner hath failed, by the Death of the Writer and instrumentary Witnesses. In such a Case, the Pursuer gives in his Articles of Improbation, which the Defender is allowed to see and answer, and to sound upon his Articles of Approbation, and both Parties allowed to prove their respective Articles. Any Evidence may be received at any Time before the extracting of the Decreet: Because, nunquam concluditur in falso.

SECT. III.

Of petitory Actions.

PETITORY Actions are those, where in the Pursuer claims something as due or belonging to him, by the Desender. Such are, 1. Actions sounded upon personal Obligations, arising from Contracts, quasi Contracts and Trespasses, of which I have spoken in their proper Places. 2. Those sounded on Rights of Property, Superiority, Annualrent, or Liferent in Lands by Insestment, or the legal Equivalent, as a Charge against the Superior upon an Adjudication, Terce, Courteses Cc. In which Actions, any Person compearations.

ing for his Interest, and producing an Infestment or equivalent Right, will be admitted. Such petitory Actions are, 1. Action of Mails and Duties: In which the Pursuer must cite not only Tenants and natural Possessors, but also Heritors, Liferenters or others in the civil Possession, by uplifting Mails and Duties. The proper Defence here is, that the Defender hath a better Right, or that he hath the Benefit of a possessiony Judgment, by seven Years Possession, upon a Title by Insestment, or other Right requiring no Infeftment, as Tacks, Oc. 2. Action of poinding the Ground. Action at the Instance of a Titular of Tithes, for bygone Tithe-duties. 4. Action of Aliment, at the Instance of an apparent Heir of simple Ward-lands, against the Superior Oa

SECT. IV.

Of possessory Actions.

POSSESSORY Actions are those, wherein an absolute Right is not insisted on, but Possession only claim'd to be attained, retained, or recovered, till the Point of Right be determined in a Reduction or Declarator. Some possession Actions require a special Title in Writ to be libelled and instructed, as Action of Removing (a), Action of Molestation (b),

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⁽a) Vid. Part 2. B. 2. Chap. 4. Tit. 4. Sect. 6. N. 8. (b) Ibid. B. 3. Chap. 1. Tit. 10. N. 8.

Action of Mails and Duties founded on a Seisin against Tenants, or on seven Years peaceable Possession, by virtue of Insestment, vested in the Pursuer, or his Predecessors or Authors immediately before, at least within Seven of the Years whereof Mails and Duties are claim'd, which is call'd the Benefit of a possessor Judgment. Other possessor Actions require no Title, but only Possessor to be libelled. And such relate either to Moveables, as Actions of Spuilzie, Actions of wrongous Intromission; or to Lands, as Actions of Ejection, Actions of Intrusion, and of succeeding in the vice: Of all which I have spoken in their proper Places.

TIT. IV.

Of accessory Actions.

ACCESSORY Actions are those, which are subservient to, and pave the Way for commencing other Actions. Such are Action of Transfumpt, Action for proving the Tenor, Action of Exhibition, Action of Transference, and Action of Wakening.

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SECT. I.

Of Actions of Transumpt;

ACTION of Transumpt is that, wherein the Pursuer seeks to get an authorized authentick Transcript or Copy of Writs, which are the common Evidents of Lands or Rights personal or real, wherein he and others have Interest. In this Action, not only the Havers of the Writs craved to be transumed, must be cited specially, but also the Granter of the Writs, or his Representatives, must be cited at the head Burgh of the Jurisdiction, where they reside. A Decreet of Transumpt, when duly obtained, hath all the Essect of a registred Writ, save that it doth not satisfy Production in a Reduction and Improbation, as an Extract out of the Books of Session or Chancery doth.

SECT. II.

Of Actions for proving the Tenor.

that whereby the Pursuer seeks the Tenor and Contents of a Writ lost to him, to be made up and proved.

2. At the first Calling of this Action, before the Ordinary in the outer House, if the Purfuer hath produced all the Adminicles, he intends Ch.

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herita lower neral tends to make Use of, the Ordinary, at his Desire, makes Avisandum therewith to the Lords. And, upon a Petition representing that the Adminicles are clear, it will be remitted to the Ordinary on concluded Causes, to mark them clear, if he finds them to be so, in or-

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3. The Tenor of a Writ may be proved, 1. By Oath of the Granter. 2. By Witnesses who knew by what Accident it was lost, and can depone that they saw that it was fairly subscribed, noways vitiated, and remember that the principal Articles therein were to the same Purpose, as the Tenor libelled, tho they be not positive as to the precise Words. 3. By Adminicles in Writ, that is, Writs subscribed by the Granter, or his Heirs or Assigns, either relating the Writ lost, or presupposing it.

4. In all Actions of proving the Tenor, casus amissionis must be libelled. If a special casus amissionis be proved, there is no Necessity of Adminicles in Writ: But where that is not done, the Tenor cannot be proved without such Adminicles. Where there are written Adminicles, it sufficeth to libel, that the Writ is lost without proving the Way it came to be lost. In proving the Tenor of Writs, which cannot be extinguished by the Granter's simple retiring of them, as Dispositions of Lands or heritable Bonds, whereupon Infestment sollowed; the Pursuer needs only to libel in general, that they were lost, without being tied L 1 4

were lost. But the Tenor of Writs, which may be extinguished by simple retiring, as perfonal unregistred Bonds, can only be made up by Oath of the Debtor, or by clearly proving

specially, how they were loft.

Executions thereof, not extant, and judicially produced, are not admitted to be proved by Witnesses (a). But Pursuits for making up the Tenor of Decreets are sustained. A Decreet proving the Tenor of a Writ, bears, that it shall be of as great Force and Essect in all Cases, as the principal Writ itself, were it extant; and therefore will satisfy the Production in an Improbation.

SECT III.

Of Exhibitions.

EXHIBITIONS are either principal, petitory, or possessions Actions, concluding to exhibit and deliver the Writ or Thing required, which are treated of in another Place (b): Or are accessory Actions, concluding only to exhibit some Writ or Thing for a particular End, such as Exhibition ad deliberandum, competent to apparent Heirs (c); and Exhibition for Proof,

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⁽a) Act 94. Parl. 6. Jam. VI. (b) Vid. Part 2. B. 3. Chap. I. Tit. 9. N. 4. (c) Vid. Part 3. B. 2. Chap. 4. Tite 14 Sect. 3.

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Proof, competent incidenter in a Cause, to any of the Parties who wants to have some Point cleared by another Man's Writ, in place where-of incident Diligence by Horning and Caption are now allowed as a more expedite Remedy (a).

SECT. IV.

Actions of Transference.

A C T I O N S of Transference are either active, or passive. Action of Transference active is, when the Pursuer craves, that a Suit commenced by his Predecessor, who died pendente lite, may be transferred active in his Person, and go on in his Name. But now such transferring active is not required. For an Heir, or Executor, or Assigny, producing their Titles, as a Service, Confirmation, or special Assignation, tho not intimated, may insist and carry on any Cause depending at his Predecessor or Author's Instance (b).

Action of Transference passive is, when the Pursuer of an Action, upon the Defender's dying during the Dependence, craves, that it may be transferred passive against his Representative, and go on in the same Manner, as it would have done against the Party deceast. This Action will be sustained against an appa-

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⁽a) Vid. infr. B. 2. Chap. 2. Tit. 2. Sect. 1. N. 14, 20, 22, 27. (b) Act 15, Sess. 4. Parle Will and Mary.

rent Heir; and when the Day of Compearance therein is elapsed, the principal Cause may be called, as it stood in the Roll.

SECT. V.

Of Actions of Wakening.

A C T I O N of Wakening is, that whereby a Process once called and fallen asleep, that is, suffered to ly over Year and Day uncalled again, is roused and set a going. This Action concludes against all the Persons cited in the principal Cause, to hear and see the same called, wakened, and begun where it left, insisted in, and Justice administred therein till a final Decision. Upon elapsing of the Day of Compearance, the principal Cause may be called, as if it had never slept. A Decreet pronounced in a Cause, the not extracted, hinders it to sleep; nor do concluded Causes want to be wakened.

Having explained Estates, and the Ways of determining civil Controversies, in Point of Right and Possession about them: I propound in the next Place, for Connexion's sake, to give an Account of the Session, the Offices relative and subservient to it, and of the Commission for Plantation of Churches and Valuation of Tithes, &c. with a general Scheme of the Method and Form of proceeding in these Courts.

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BOOK II.

CHAP. I.

Of the Court of Seffion.



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HIS Court (called the College of Justice) sits in a House, called the Session-bouse, consisting of an inner and outer House. The inner House is a large square Room,

to which the Lords enter through a Waitingroom on the north Side, where they, the Advocates and principal Clerks, put on their Gowns. Every Lord hath a locked Box standing upon a Table in this Waiting-room, from Two till Four in the Afternoon, and upon the penult Day of the Session, from Two till Six; wherein all, who have Informations, Petitions, or Answers to Petitions, to offer, may put them in by a Slit in the Cover. Each of the inner House Clerks has also such a Box fet out there at the same Time, wherein are put the Papers relating to Causes he is Clerk to. The Lords sit in the inner House in a Body, at a semicircular Bench, in the Fashion of an Amphitheatre, and are ferved by Six principal Clerks

Clerks fitting at a Table before them, where also the Clerk Register sits, when he thinks sit to attend, in his Gown. The Bar, at which the Advocates stand and plead, is opposite to the Bench. At the East Corner of the inner House a Lord sits upon the Bills, at a Table, attended by the Clerk of the Bills. Two Doors, on the West Side of this House, open to the outer House. By the Southern Door of Communication, the Ordinaries and the Clerks do pass and repass; and, by the other Communication Door, Advocates and Parties concerned go to and from the inner House Bar, as they have Occasion. In the Middle of the South Side of the outer House, at a little Distance from the Wall, there is an high Bench ewhere the Lord Ordinary of that House sits, and is served by six Under-clerks, called the Clerks of the outer House, seated at a long Table before him. In a Desk adjoyning to the Bench, on the left Hand, the Clerk, or Keeper of the Minute-book fits. Opposite to the Bench there is a Bar, called the Fore-bar, where the Advocates plead. Betwixt the Bar and the Clerks Table, there is a void Passage, where Parties and Witnesses come in to make Faith. Behind the Fore-bar there is a large square Area, where the Advocates attend till they are called to plead. But his Majesty's Advocate has a Chair within the Bars where he fits

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Concerning the Persons of whom this Court is im-

THE Persons, directly constituting the Session, are the Judges, Advocates, Clerks, Macers, and Keepers of the Rolls.

SECT I.

Of Judges in the Session.

Senators of the College of Justice, or Lords of Council and Session, consist of Fourteen ordinary Lords (whereof one is constant President) and Four extraordinary Lords, who enjoy their Places for Life, and are named by Letters from the Sovereign.

2. The ordinary Lords are admitted by the rest, upon passing a Trial (a). And the Person, presented to be such a Lord, must be, 1. Twenty five Years of Age, a Man searing God, learned and conversant in the Laws, having, of yearly Rent, at least, 1000 Merks, or Twenty Chalders of Victual (b). 2. He must be

⁽a) Act of Seder. 31 July, 1674. (b) Act 132. Parl. 12. James VI.

be one who hath ferved Five Years as an Advocate, or principal Clerk of the Seffion; or Ten Years as a Writer to the Signet, found qualified for the Station of an Advocate, by the Faculty of Advocates, in a publick and private Trial upon the civil Law, Two Years before he fet up to be a Lord (a).

3. The extraordinary Lords are received upon the King's Letter, without Examination,

or Trial.

4. The Lords of Session are vested with a duplex officium, viz. ordinarium, and extraordi-

narium.

Their officium ordinarium is exerced always at the Request of Parties, according to the Nature of the Action. Officium extraordinarium, called officium nobile, is exercised sometimes at the Suit of Parties, and sometimes of their own accord, in new and singular Cases, for qualifying strict Law and Form with Equity.

of civil Matters, in the first Instance, except, 1. Business concerning his Majesty's Rents and Casualties, which are appropriated to the Barons of Exchequer. 2. Causes maritim, which belong to the Judge of Admiralty. 3. Cases consisterial, which fall under the peculiar Jurisdiction of Commissaries. 4. Causes within 200 Merks, which must be pursued before inferior Judges, except where the Defenders are Members of the College of Justice, or live in several Jurisdiction.

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dictions; or where Sums due to Merchants, Cooks, Vintners, and others within Burgh, for Furniture taken off from them by Persons living without the Shire, are pursued (a). But tho, in the Cases abovementioned, the Lords be not Judges competent in the First Instance, they may judge them in the Second, by Advocation, Suspension, or Reduction. They were once Judges of civil Causes in the last Resort: But the Claim of Right 1689 allows to protest, for Remedy of Law, against their Sentences, to King and Parliament; and now, since the Union, Appeals ly from them, to the House of Peers in Parliament assembled.

6. If the Lords of Session, in Causes before them, give partial Counsel (b), or directly, or indirectly take Bribes (c), they are punishable by Insamy, Deprivation, and Confiscation of Moveables. Where any Lord is unduly sollicited, or informed, by Word, or Letter in a depending Cause, in favour of one of the Parties to the other's Prejudice, the Solliciter is fined according to his Quality; and unless the Lord, addressed by verbal Sollicitation, stop, or withdraw from the Speaker, or sollicited by an E-pistle, present the same to the Lords in presence, he may be declined (d).

SECT.

Parl. 7. James V. (c) Act 93. Parl. 6. James VI. (d) Act of Seder. December, 1679.

SECT. II.

Of Advocates.

1. A D V O C A T E S are a Society of Persons, learned in the Laws, called the Faculty of Advocates. The Members whereof are privileged to plead before all Courts. They are admitted by the Lords of Session, when found qualified by the Faculty, ordinarily after a private and publick Trial of their Knowledge in the Civil Law; and sometimes, the rarely, after they are examined upon the municipal Law of Scotland.

2. Advocates subscribe all Informations, Bills, and Answers given in to the Lords, Outgivings and Returns of Promises; and are subject to the Authority of the Lords, who set Rules to them in the Conduct of their Business, and may censure, fine, or debar them from their Imployment, for Disobedience, or

malverfing in their Office.

3. The King names, out of the Body of Advocates, an eminent Person, called Lord Advocate, who gives Advice in making and executing Laws, defends the King's Right and Interest, concurs in all Suits before sovereign Courts, for Breaches of the Peace, and also in all Matters civil, wherein the Sovereign, or any claiming under his Majesty, has Interest. The King names also a Lawier or Two, for his

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his Sollicitors, who take care of the dispatching, and transmitting the King or Council's Orders through Scotland, and are assistant to the Lord Advocate in the King's Concerns, Processes and Assairs.

SECT. 111.

Clerks of the Seffions

clerk Register, or Lord Register, who keeps all the publick Records, and grants Deputations for Life, the he has his own Office only during the King's Pleasure. His Deputyclerks in the Session, whom he names, are, the The principal Clerks, called Clerks of the inner House.

2. The principal Clerks of the Bills.

3. A Clerk, or Keeper of the Minute-books.

4. Clerks to the Admission of Notaries.

2. There are Six principal Clerks in the inner House, who have their Commission from
the Clerk Register for Life, with Power to appoint Under-clerks, or Clerks for the outer
House, and Extracters in their several Offices.
No Person can be a Clerk of the inner House,
who hath not served Three Years as an Advocate, or Writer to the Signet. And the
Clerk must, at his Admission, purge himself
by Oath, that he hath not given, or promised,
for the procuring his Office, more than 4000
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Merks, or a Year's Salary (a). They are admitted by the Lords, upon a Trial before them. Tis incumbent upon these Clerks, to minute the Heads of Causes and Debates, write the Deliverance of Bills, interlocutory and definitive Sentences by the Lords in the inner House, and to get them duly signed by the President, and to prepare all concluded Causes.

3. Clerks of the outer House are named by the principal Clerks, and received by the Lords. Each of them must, at his Admission, swear, that he has not given, or promifed, for obtaining his Place, more than 1000 L. Scots, or a Year's Salary (b). These Clerks minute likewife, in their Course, all Debates before the Ordinary in the outer House, or at the side Bar, and write his Sentences. Tis their Work also to see all Acts, and Decreets pronounced, duly put in the Minute-book, to write the Depositions of Parties and Witnesses; and each Seffion Day, at Twelve of the Clack, to intimate, in the outer House, Deliverances in prasentia upon Bills, and to make the other usual and necessary Intimations there,

4. Clerks of the Session are Notaries, by virtue of their Office, and Instruments under their Hands, in judicial Acts, make the like Faith, as the Instrument of any Notary. They cannot be declined, in Processes before the Lords, upon Suspicion of Partiality to either Party.

SECT.

⁽¹⁾ Act of Regul. 1695. Art. 10. (6) Ibid.

Ch. 1. Law of Scotland. Tit. 1. § 4. 179

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SECT. IV.

Clerks of the Bills.

r. THE principal Clerk, or Clerks of the Bills, and Three Deputy-clerks put in by him or them, ferve all in an Office, called the Bill-chamber. Where they attend from Nine till Ten in the Morning, and from Two till Six in the Afternoon, for receiving fuch Bills as shall be offered to them; and carry the same to the Ordinary upon the Bills, in order to passing or resusing. There are, at present, Two principal Clerks, who attend monthly in their Turns. Their Business is to present Bills to the Ordinary, and sign, with his Lordship, such Bills as pass of Course.

2. Tis incumbent upon one of the Underclerks, to receive Bonds of Cautionry in all Suspensions of civil Debt, and to enquire into the Condition of the Cautioners. The other Two receive Cautioners in loosing Arrestments, and in Suspensions of Lawborrows, and the Registers of Allowance of Decreets of Apprising, and of Abbreviates of

Decreets of Adjudication.

3. A Roll of the Deliverances upon Bills of Advocation and Suspension, is affixed, when given, and continues for a Week patent in the Bill-chamber. And such Deliverances are in Time of Session, intimated the next Session Day, in the outer House, at the ordinary M m 2

180 Part IV. Institutes of the Book II.

Time and Place of Intimation (a). Minute-books of past and refused Bills of Suspension (b) and Advocation, according to the alphabetick Order, is also patent in the Bill-chamber to any Charger gratis.

SECT. V.

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Clerk, or Keeper of the Minute-book.

THE Clerk, or Keeper of the Minute-book, notes, or inferts therein, all Acts, Decreets, Protestations, and every judicial Act that may be extracted, marking the Day when pronounced, the Names of the Judge, Pursuer and Defender, and Advocate for the Pursuer, with the initial Letters of the Names of the principal and Under-clerks.

SECT. VI.

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Clerk to the Notaries.

the Lords of Session, upon a Petition given in for them by the Clerk to the Notaries, with a Certificate of the Petitioner's good Fame and Education, after Trial of their Knowledge

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2. Instruments of Notaries are the only Mean of proving the Performance of some Solemni-

of proving the Performance of some Solemnities of Law, as the giving of Seisin, making Resignation, Intimation, Premonition, Requisition, Consignation, &c. Notaries subscribe Writs for Persons known, and declaring to them they cannot write, and allowing the Notaries to sign for them; in Token whereof, they touch the Notary's Pen. When the Prothocal delivered to a Notary at his Entry is filled up, he gets a new one from the Clerk. The Clerk of Notaries keeps filled up Prothocals, and exhibits the same to the Lieges, for extending and transuming Instruments on all Occasions.

3. Prothocals of deceas'd Notaries are to be brought in to the Clerk, within Fifteen Days after the Notary's Death, under the Pain of 100 L. (c). But Prothocals of Clerks of Burghs Royal deceas'd, are to be delivered up to the Magistrates (d).

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⁽a) Act of Seder. 30 July 1691. (b) Act 45 Parl. 11. junct. Act 22. Parl. 2. Jam. VI. (c) Ibid. (d) dict. Act 22.

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4. Notaries are exauctorated and depriv'd only by the Lords of Session.

SECT. VII.

Macers

MACERS are Four in Number, whereof Three are named by the King, and the Fourth by Moncrief of Reidie, who is hereditary Macer. One Macer attends constantly on the the Lord Ordinary in the outer House, another attends the Ordinary at the Side-bar, and the other Two wait the Motions of the Lords in the inner House. These Macers call or proclaim Causes, usher the Lords, and execute their immediate Orders. They are supreme Judges in the Service of all Brieves issued forth of the Chancery, to whom the Lords advocate Services from inserior Judges; and appoint usually some of their own Number Assessment to direct the Macers.

SECT. VIII.

Keeper of the Rolls,

ing the Session, sour Books of Involvent are made, Two for the outer House, and Two for the inner House. The First for the outer House contains Causes that require mest Dispatch, as Sul-

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Suspensions, Advocations, Removings, Ejections, and recent Spuilzies; and the Second, ordinary Actions, or all other Causes proper to the outer House. The First for the inner House contains ordinary Actions appropriated to that House, viz. Reductions, wherein the Production is latisfied, Declarators of Rights, proving of Tenors, cessiones bonorum, with which, after discussing of dilatory Defences and preliminary Points, great avisandum is made, and Causes which the Lords upon Report ordain to be heard in Presence; and the other Book

is made up of concluded Caufes.

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2. Causes are inrolled in Term time, betwixt Two and Four a Clock on Saturday Afternoon, by the Keeper or Keepers of the Books of Inrolment, according to a Note mentioning the Name of the Cause, and the Names of the Parties in Order as they are presented. Causes are entred in the respective Books of Inrolment for the outer House, according to the Date of the Return from the Advocate who faw the Process. Ordinary Actions are inserted in the first Book of Incolment for the inner House, according to the Dates of the Avisandums, or Interlocutors appointing a Hearing in Prefence, and concluded Causes in the other Book, according to the Dates of the Acts concluding the Caufes.

3. Out of each of the two Books for the outer House, the Keeper doth excerp a Roll of fo many Causes, in the Order they were en-

tred, as he thinks will be fufficient for the ensuing Week; and prefixeth to that of ordinary Actions, a Roll of Causes wherein no Compearance was made for the Defender, at the first Calling by the Clerk in the outer House, called the Regulation Roll, because appointed by the Act of Regulation 1695 (a). Which Rolls he affixeth each Munday Morning upon the Wall of the outer House; and any of these which are not then reached or discuss d, by Act, Decreet or Protestation, must be inferted in the Beginning of the subsequent weekly Roll of that Kind. Again, one Roll for the inner House is drawn out of the Book of ordinary Actions; and two Rolls out of that of concluded Causes, viz. one of concluded Causes to be prepared, and another of such Causes prepared for advising. Which Rolls the Keeper of the Books affixes every Munday Morning, or oftner, if need be, on the Wall of the outer House. The Keeper of the Books of Inrolment doth also put up weekly Rolls of Causes to be heard summarly in Presence, called the President's Hand-roll, and that of Causes wherein Proof adduced by Oath or Writ is marked clear: The former of which Rolls is affixed to the Wall of the outer Houle upon Munday Morning; and the latter upon Friday Afternoon (b).

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⁽a) Art. 21. (b) Act of Regul. 1694. Art. 22. Act of Sed. 20 November, 1711. § 11.

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Concerning the Offices and Officers relative and Subservient to the Session.

HESE are the Chancery, the Offices of the Seals, of the Registers, and the Lyon.

SECT. I.

Of the Chancery or Chancellary.

1. THE Chancery is an Office, managed by the Director thereof, who derives his Commission from the King, and by his Deputies.

2. These cause to be writ and recorded all Charters, Patents of Dignities, Gifts of Offices, Remissions, Legitimations, Birth-brieves, Prefentations, Commissions, Brieves, Retours, Precepts thereon, and all other Writs appointed to pass the Great Seal, or the Quarter Seal, which is kept by the Director of the Chancery.

3. The Director and his Deputies observe, in all Writs extended in the Chancery, a certain Formula kept in Record by them, called the Order of the Chancellary. And Writs passing this Office are to be recorded, before they are

given out to be fealed (a).

4. The

⁽a) Act 17. Parl. 2. Seff. 3. Ch. II.

4. The Brieves of Chancery are the King's Precepts, commanding fomething to be done. Which are directed to, and ferved or executed by Sheriffs, Stewarts, and Bailies of Royalty or Regality respectively. These are of Two Sorts, viz. Brieves retoured to the Chancery, and Brieves not retoured. Retoured Brieves are those which are executed, without citing particular Parties, at the Market-cross of the head Burgh of the Jurisdiction, upon Fifteen Days Warning, thence called Brieves not pleadable: Such are Brieves of Mortancestry for ferving Heirs, Brieves of Pupillarity, and Brieves of lidiotry and Furiofity. Whereupon Services expede by the Judge Ordinary, are returned to the Chancery, where they are recorded, and Extracts thereof given out, called Retours. Brieves not retoured are directed to Sheriffs, Oc. to hear and determine upon citing of Parties specially, thence called pleadable Brieves: Such are Brieves of Terce, Brieves of Division, Brieves of Lyning, and Brieves of Perambulation.

SECT. II.

Offices of the Seals.

THE publick Seals in Scotland are the Signet, the Great Seal, the Quarter Seal, and the Privy Seal.

1. Summons for citing Persons before the Lords of Session, Letters of Horning, Caption, In-

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Inhibition, Arrestment, and other personal or real Diligence, Signatures and Precepts passthe King's Signet, kept by the Secretary of State for Scotland, in virtue of his Office, who commits the Cultody and Care thereof to his Deputies. All that ordinarily passeth the Signet is written and subscribed by Persons, thence called Writers or Clerks to the Signet. Out of whom some are appointed by the Secretary at Pleasure, to be of his Council, called Commissioners of the Signet. Their Business is to manage Affairs of the Society, direct Writers in their Duty, and answer Doubts relating to Form and Stile. The deputy Keepers of the Signet, in Absence of the Secretary, preside in all Meetings of the Writers, and interpole their Authority to what is done. Intrant Writers to the Signet, obtain first a Commission from the Secretary, and then after Trial of their Knowledge in Stile, are admitted by the Keeper and Commissioners. The Signet Office, in a House belonging to the Society of the Writers to the Signet, is kept patent in Session Time from Nine to Twelve in the Forenoon, and from Two to Six in the Afternoon: And in the Vacation from Ten till Twelve, and from Two till Four, except on Munday, when it opens not either in Session or Vacation till Two, and shuts at Four in the Asternoon, and Saturday, when it is patent only in the Forenoon.

2. Char-

2. Charters of heritable Rights, and all Commissions not allowed by Statute to pass otherwise, did before the Union pass under the Great Seal, kept by the Lord Chancellor of Scotland; and now since the Union, pass under a Seal used in place of the Great Seal: The Custody whereof is committed to some honourable Person, appointed by the King during Pleasure, who has a Deputy under him, who gives constant Attendance.

3. The Quarter Seal, which is a Fourth Part of the Great Seal, is appended to Writs sub-servient to heritable Rights that have passed the Great Seal, and is therefore called the Testimonial of the Great Seal. The Director of the Chancery has the Custody of this Quarter Seal, and appends it to such Writs as pass under it.

4. The Privy Seal is appended to all Precepts for Charters to be expede under the Great Seal, and to Writs which pass no other Seals. The Custody thereof belongs to the Lord Privy Seal, who has a Deputy, who always attends for setting this Seal to Writs passing under it. There is also a Writer or Clerk to the Privy Seal, deriving his Commission from the King, who writes and records all Writs passing the same, before they are given out to be sealed, and keeps a Minute-book (a).

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SECT. III.

The Register Offices:

1. SOME Writs must be registred within a certain Time, otherwise they are null, as Letters of Horning and Inhibition, Oc. with the Executions thereof; or not so effectual as they would have been, if recorded in due Time, as Seisins, Oc. Others must be regifired in order to Diligence, or some legal Effect, and the Time of Registration left to the Parties themselves, as Bonds, Oc.

2. Register Offices are either particular, or

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3. Particular Registers are those, that are restricted to a particular Jurisdiction. Some whereof depend upon the Clerk Register, as the particular Registers of Shires, Stewartries, Regalities, or Bailliaries: Others are independent of him, as the Registers of Burghs Royal, which depend only upon the Magistrates.

4. The general Registers have Effect over all Scotland, are kept at Edinburgh, where the Clerk Register has Deputies, for keeping them in distinct Offices, one for the Register of Seisins, Reversions, Oc. another for the Regiiters of Hornings, Inhibitions and Interdictions.

The Clerk Register has also Deputies at Edinburgh for recording in one particular Re-

gifter all Tailzies, and in another all Summonles for interrupting Prescription of real Rights. with their Executions, and Instruments of In-There are also Registers kept in terruption. the Offices of the Chancery, and Privy Seal. In the Office of each Clerk of the Seffion, there is one Register of Decreets, another of Bonds in order to Execution, and a third of Writs for Confervation, in which also probative Writs are recorded. There is also a particular Regifter of Executions of edictal Citations in a Process of Sale and Ranking in the Case of Bankrupcy, kept by the Collector of the Clerks Dues. And the Clerk Register should visit the Registers in every Chamber once in the Year (a).

5. The Clerk Register, from Time to Time, calls in the Records with the Warrants thereof, and puts them in a Room below the Session-house, where his Lordship hath a Servant daily attending, to furnish a View, and give Extracts to such as want them. And the Keepers of Registers, in use to be transmitted to the Clerk Register, should keep only ten Years Records in their Hands, for the Use of

the Lieges (b).

6. Registration of Writs incompetently without the Jurisdiction, and all Execution thereon is null; and the Clerk of an inferior Court, who registrates any Writ without his Jurisdiction, is liable to Deprivation, and 500 Merks

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of Penalty, Half to the King, and Half to the Pursuer (a). Where a Writ or Diligence given in to be registred, is returned to the Presenter, bearing an Attestation under the Keeper's Hand, that it is registred, such a Writ, if not found booked and inserted in the Record, is of no Force or Essect against any save the Granter and his Heirs. But the Keeper of the Register emitting to insert therein such a Writ, is punishable as a Forger of the publick Records, and liable for Damages to the Person lesed through his Omission, who has Action against the Heirs and Representatives of the negligent Keeper, tho not commenced in his Lifetime (b).

SECT. IV.

The Lyon Office.

Arms, who holds his Office by Patent under the Great Seal, attests Genealogies, admits Officers at Arms, viz. Heralds, Pursevants, and Messengers, with Injunctions, upon finding Caution at their Entry for their good Behaviour, under Pain of 500 Merks, besides the Cost and Damage sustained by Parties (c); and holds two solemn peremptory Head Courts in the Year, at Edinburgh 6 May, and 6 November,

⁽a) Dict. Act 38. (b) Act 19. Seff. 2. Parl. Jam. VII. junct. Act 18. Seff. 6. Parl. ik. W. (c) Act 46. Parl 11. Jam. VI.

wember, when all Officers at Arms are obliged to appear before him; and at other Times as he has Occasion to call one. He may deprive such Officers for Misbehaviour, and decern their Cautioners to pay the Pain aforesaid of 500 Merks contained in their Bonds, whereof a Third goes to himself (a). The Lyon, who is principal Herald of the Order of St. Andrew, or the Thistle, has six Heralds, six Pursevants, and a great Number of Messengers under him.

and Pursevants, belongs the publishing the King's Preclamations; and the reversing of Arms after Sentence of Forseiture. The Lyon and his Brethren the Heralds have Power to give and difference Coats of Arms, to visit the Arms of Noblemen and Gentlemen, and to inhibit such to bear Arms, as by the Law of Arms ought not to bear them, under the Pain of elcheating the Thing to the King whereon the Arms are found, and of 100 L. to the Lyon and his Brethren, or of Imprisonment during the Lyon's Pleasure (b).

3. The Business of Messengers is, to execute Summonses and Letters of Diligence, real or personal, for civil Debt. The Badges of a Messenger are a Blazon, and a Rod or Wand, called the Wand of Peace, whereby his Authority is discovered, in discharging the Duty of his Officer

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fice; and the affronting or relifting him therein is a Crime called Deforcement (a).

Having thus treated of the feveral Persons of whom the Court of Session immediately confifts, and of the contingent and subservient Offices and Officers: I shall in the next Place explain the Method of doing Business before the Session, called the Form of Process.

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The Form of Process before the Session.

HE Session sits twice a Year, vizi from the first Day of June till the last of July inclusive, called the Summer Seffion; and from the hist of November till the last of February inclusive, without regard to the Christmas Vacation, called the Winter Session.

For clearing up the Order of judicial proceeding in this Court, I shall first fet forth the feveral Provinces affign'd to particular Lords, and to a Quorum of the collegiate Body separately; and then the Method of commencing, carrying on, and finally determining Causes.

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Of the Provinces affigued to particular Lords, and to a Quorum of the collegiate Body separately; and how Business is expede by them respectively in the Session.

1. THE Lords meet five Days of the Week, viz. Tuesday, Wednesday, Thursday, Friday and Saturday at Nine a Clock in the Morning, when the Session-bell is rung, and fit judging Causes till 12. of which they are advertised by one of the Keepers of the Session House, who proclaims it. Then a little Bell is rung to signific to those in the outer House to rise. But the first Week of a Session, the Court useth not to sit down till 10 a Clock.

the Session Days in different Capacities, according to the Nature and Import of Business assigned to them. Every Lord, except the President, takes his Turn weekly of sitting in the outer House, upon the Bills, upon Oaths of Parties and Witnesses, and upon concluded Causes. Each of these Lords has also an Hour of judging, according to the Order aforesaid, at the Side-bar, except the Ordinary in the outer House, and of judging at the Fore-bar, before the outer House Lord posses the Bench Particular Lords are also pro re nata detached

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3. All Writs, whereof the Ingivers of Bills, or Representations, or Answers to such, found any Alledgance on, must be produced therewith: And 24 Hours, before calling any Cause, all Writs to be founded on by either Party, not formerly seen by his Adversary, must be put in the Clerk's Hands, otherwise the Alledgance will not be admitted, without paying in a concluded Cause 14 shil. 2 pence, and in other Cases 20 sh. Sterl. nor will the Passages in such Writs pleaded on be regarded, if not marked, with:

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A Decreet pronounc'd by an ordinary Lord, is of as great Force and Authority, as a Decreet in the inner House.

SECT. I.

The Ordinary betwixt 9 and 10 at the Fore-bar.

one Lord in Course after another, and upon Saturday the last Week's Ordinary in the outer House, hath an Hour betwixt 9 and 10 of judging on the Fore-bench Causes in his Handroll depending before him, or remitted to him. But upon any Friday, that happens among the five last Sederum Days of the Session, the Lords come to the Fore-bar in their Turns as on the three preceeding Days (b).

SECT. II.

The Ordinary in the outer House.

1. TUESDAT at 10 a Clock the Prefident delivers, to the Ordinary for the outer House that Week, the Roll of Suspensions, Advocations, Oc. and that of ordinary Actions, whereupon he goes immediately and takes his Seat Ch.

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⁽a) Act of Sed. 20 Novem. 1711. 5. 6. (b) Act of Sed. 1 Feb. 1715.

Seat on the Fore-bench, where he judges Causes in the Suspension and Advocation Roll till Twelve: But frequently for Reafons given, delays some Causes till the next, or

some other Day in that Week.

2. When he comes out to this Bench on Wednesday at 10 a Clock, Acts are first called, conform to particular Rolls thereof, handed up to the Macer attending, by the particular Clerks in Order: Which Rolls had been atfix'd the Night before upon the Wall of the Side-bar. When these are overs the Ordinary falls to the Roll of Suspensions and Advocations, wherein he first calls any Caufes that had the Day before been continued till Wednesday; and judges fuch till 12 a Clock, unless he hath gone through his Roll fooner, in which Case he returns to the inner House when it is finished. But if the said Roll appointed for Tuesday and Wednesday was finished upon Tuesday, or the Ordinary, at his leaving the Bench that Day, forefaw that the Causes referv'd for Wednesday would be discuss'd before Twelve a Clock, he intimates to the Advocates, that upon Wednesday, after calling of the Acts, and finishing his Suspension, &c. Roll, he will hear the Causes in the Regulation Roll of ordinary Actions.

3. Thursday from Ten to Twelve Causes in the ordinary Action Roll are heard and determined, any Causes in the former Roll delayed

till that Day, being first called.

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⁽a) Act of Sed. 20 Novem. 1711. 5. 6. (b) Act of Sed. 1 Feb. 1715.

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Seat ed- 1 upon Wednesday, and then the Ordinary, after discussing continued Causes, goes to his Roll of ordinary Actions, which imploys him till Twelve, if it last so long. Friday's Night the Ordinary's Servant puts upon the Wall of the Side-bar, a Hand-roll' of Causes already fixed before his Lordship by Act, Decreet, or Protestation, wherein one of the Parites seeks to be further heard, or to have some Interlocutor rectified or altered, consisting in the first Place of Causes in the outer House Rolls of that Week.

calls out of the said outer House Rolls, Causes continued till that Day, if any be, then goes to his Hand-roll, and sits judging Causes therein till Twelve, unless these be sooner dicused.

6. Upon the last Eight Days of the Session, there is no Lord Ordinary in the outer House, nor Rolls of Suspensions, &c. or ordinary Actions put up to be called, except the Regulation Roll. But every Session Day, except Friday, the Lords come to the Fore-bar in their Turn, to judge Causes in their Hand-rolls, for the Space of an Hour, viz. one from Nine till Ten, another from Ten till Eleven, and a Third from Eleven to Twelve in the Forenoon.

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The Ordinary upon the Bills.

r. THE Ordinary upon the Bills, fits both in Selfion and Vacation, from Tuesday till Tuesday. In Term Time, or the Time of Selfion, he advises Bills every Selfion Day in the Foremoon, except on Friday, on which Day he considers them in the Afternoon, at Three a Clock in the Selfion House. But upon any Friday happening among the Five last Sederunt Days of the Selfion, he may fit upon them in the Forenoon (a).

2. These Bills in the Vacation, are presented and considered each Tuesday and Thursday, betwixt Ten and Twelve in the Forenoon, when the Ordinary must attend. The Ordinary of the preceeding and subsequent Weeks, must attend with the Ordinary for the Time every Thursday, for dispatching such Bills as require Three Lords; but during the Time that the Lords of Justiciary are in Circuit, the next Lords in Course officiate in their Weeks (b).

3. For understanding what is incumbent upon this Ordinary, it may be noticed, that when
a Person finds himself aggrieved by any inferior Judge, the Cause may be called up to the
Session by Advocation before, or Suspension and
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⁽a) Act of Seder. 1 Feb. 1715. (b) Act of Seder. 25 December 1708.

Reduction after the Sentence, in order to get it reviewed, or a Stop put to the Execution of it. Which Advocations and Suspensions are procured or refused, by Deliverance or Inter-lecutor of the Ordinary, upon Bills or Petitions offered to him for that end. This Ordinary passeth of Course common Bills of Horning, Caption, Arrestment, loosing Arrestment, Inhibition, Lawborrows, Oc. and Bills of Summonses, upon the Faith of the Clerk of the Bills. But Bills of Advocation and Suspension are particularly considered by the Lords, I shall therefore first observe what is common to both, and then set forth their Specialities.

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Rules common to Bills of Advocation and Sufpension.

THE Bill drawn and signed by a Writer to the Signet, being presented to the Clerk of the Bills, he writes on the Back thereof the Day of presenting, and carries it to the Ordinary, who, if the Reasons be irrelevant, or not instructed, refuses the Bill. When the Reasons in a Bill are doubtful, and not clear, the Ordinary appoints the Bill to be seen and answered, betwixt and a certain Day, and in the mean Time sists Procedure in the principal Cause, if it be an Advocation, or stops Execution, if a Suspension, either expressly for a limited

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mited Time not exceeding a Month (a), or indefinitely expressing no Day, which is understood a Stop for a Fortnight from the Date of the Deliverance (b). When Process or Execution is fifted to a certain Day, falling within another Ordinary's Week, the Bill and Answers come to be confidered by that Ordinary. But in Time of Session, whatever Ordinary a Bill is presented to, the same, with the Answers, remain still before him till the Letters be expede. Where the Reasons are clear and relevant, the Ordinary passeth the Bill immediately; whereupon the Writer to the Signet raiseth Letters, and fends them to the Signer Office. In Time of Seffion, sometimes the Party against whom a Bill is offered, gives in a Petition to the whole Lords, for a Warrant to difcuss the Reasons summarly upon the Bill; the Defire whereof is ordinarily granted. A Warrant for fummary discussing being obtained, is given in to, and intimated by one of the Underclerks of Session, to the Suspender or Raiser of the Advocation. And the Ordinary, to whom the Bill was presented, may, upon calling the Parties to the Side-bar, at any Time except on Friday Forenoon, discuss, or in case of Difficulty, report the Reasons to the whole Lords, without waiting for his Turn of judging at the Side-bar, or Day of reporting.

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⁽a) AA of Seder. 9 Feb. 1675. (b) AA of Seder. 3 July

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Specialities in a Bill of Advocation.

1. SOME Causes cannot at all be advocated, as Caufes maritim from the High Court of Admiralty (a). Others cannot be advocated except upon Iniquity; fuch are those expresly appointed to be determined by the inferior Judge (b), viz. Confirmations and Divorces from the Commissaries, or Causes within 200 Merks. But Caufes within 200 Merks may in some Instances be advocated, tho' the Judge hath committed no Iniquity! As where the Defenders are Members of the College of Justice; or live in several Jurisdictions; or where Sums due to Merchants, Cooks, Vint-ners, and others within Burgh, for Furniture taken off from them by Perfons dwelling without the Shire, are purfued (c).

2. As to Causes that may be advocated, if the Reason of Advocation be clear and relevant, the Ordinary passeth the Bill, and thereupon Letters of Advocation are expede at the Signet. Which are then intimated judicially to the Judge and Clerk of the Court, from which the Cause is advocated, admitted by the Judge, marked and figned by the Clerk on the Margin of the principal Letters, whereof a

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⁽a) Act 16. Parl. 3. Ch. II. (b) Act 9. Seff. 3. Parl. 1. Ch. II. (6) Act of Regul. 1672. concerning the Session, Article 16.

Ch. 2. Law of Scotland. Tit. 1. § 3. 203

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Specialities in a Bill of Suspension.

1. THE Ordinary on the Bills may suspend all Decreets of inserior Courts, excepting that of the High Admiralty; and even suspend Decreets of Session pronounced in Absence of the Desender. But Bills of Importance, as these for suspending Decreets in fore before the Lords, second, third or posterior Protestations (a), Decreets of the high Court of Admiralty (b), or Bills of Suspension resused by a former Ordinary in his Week, or new Bills on the same Grounds (c), can be past only by a Querum of the Lords in Term Time, or by three Lords met together during the Vacation.

2. Some Bills of Suspension may be past upon the Suspender's finding Caution. Others can be past only upon his configning the Sums charged for. A Suspension against a Bishop, Minister, or Master of University, College, School, or Hospital, of any Charge for their Dues in special Decreets, cannot pass, except upon Production of Discharges, or upon Confignation

(a) Ib'd. Art. 19. (b) Act 16 Parl. 3. Ch. II. (c) Act of Seder. 9 February 1675. and 9 February 1685

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Specialities in a Bill of Advocation.

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2. Some Bills of Suspension may be past upon the Suspender's finding Caution. Others can be past only upon his configning the Sums charged for. A Suspension against a Bishop, Minister, or Master of University, College, School, or Hospital, of any Charge for their Dues in special Decreets, cannot pass, except upon Production of Discharges, or upon Confignation

(a) Ib'd. Art. 19. (b) Act 16 Parl. 3. Ch. II. (c) Acta of Seder. 9 February 1675. and 9 February 1685.

fignation of the Sums charged for, or 100 Merks for each Chalder of Victual charged for, and proportionably if the Charge be for less; without Prejudice of a higher Charge, or lower Modification at discussing (a). At the passing of Suspension of a Decreet of Exhibition, the Suspension of a Decreet of Exhibition, the Suspension of the Writs called for, and he is ordained to consign, in the Hands of the Clerk of the Bills, such as he acknowledges the having of,

3. A Bill of Suspension at the Instance of a Person incarcerated, craving a Charge to be set at Liberty, cannot pass, unless he instruct previous Intimation of the Time of presenting the Bill, within the Latitude of eight Days, to the Creditor at whose Instance the Suspender is in

Prison, if within the Kingdom (b).

4. To prevent Multiplicity of Suspensions, the Ordinary may pass Bills in Part, as the Reasons appear to him instructed, and resuse them as to the Remainder, upon which Letters will be expede as to that Part only (c).

5. When a Bill of Suspension is passed, the Suspender is allowed a Forthnight for finding Caution, or consigning in the Terms of the Ordinary's Deliverance thereon. And if Caution be not found, or Consignation made within such a Time, a Prorogation of the Sist to a

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longer Date be ob nary (Clerk Charg ner, a that is the Ca Clerk, excepti be fuf Cautio Subfidia tioner Bill pa find C give in Cautio with ar better, ger of be prese can be of Seffic and the thereof. must all

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⁽a) Act 6. Parl. 2. Seff. 1. Ch. II. junct. Act 14. Seff. 6. Parl. K. W. (b) Act of Sed. 21 July 1675. (c) Act of Seder-20 November 1711. § 1.

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longer Day, not exceeding a Month from the Date of the first presenting of the Bill, may be obtained upon Application to the Ordinary (a), which must be intimated. The Clerk of the Bills is liable for Damages to the Charger, if he receive an infufficient Cautioner, and to the Suspender, if he refuse one that is sufficient (b). When the Condition of the Cautioner is doubted, or unknown to the Clerk, some Person more responsible and unexceptionable must attest, and declare him to be fufficient. Which Attester must bind as Cautioner for the Cautioner, and be liable Subsidiarie in his Order as fully as the Cautioner (c). If a Suspender, who has got his Bill past upon finding Caution, is unable to find Caution in the Terms thereof, he may give in a new Bill, bearing an Offer of juratory Caution, that is, such Caution as he can get, with an Offer to fwear, that he can find no better, after previous Intimation to the Charger of the particular Day when the Bill is to be presented. Upon which Caution the Bill can be past only by the whole Lords in Time of Session, and by three Lords in the Vacation; and the Charger must be called to the passing thereof. The Suspender upon such Caution, must also, before expeding the Bill, swear upon and confign in the Clerk's Hands in favour of the Charger, in so far as the Letters shall be

⁽a) Act of Sed. 3 July 1677. (b) Act of Sed. 18 February 1686. (c) Act of Sed. 27 December 1709.

Ch. 2.

found orderly proceeded, a fufficient Disposition or Assignation to any Estate or Estects belonging to him the Suspender. But when the Suspender is in Prison, no juratory Caution can be received in a Suspension and Charge to set at Liberty (a): And in such a Case the Suspender must find Caution, not only for the Charger's Security, but also for the escheat Goods belonging to him before the Relaxation.

6. When, upon a past Bill, the Cautioner is received, or Consignation made in the Terms of the Ordinary's Deliverance, Letters of Sufpension, suspending the Charge till a certian Day, are expede at the Signet. And, after Delivery of a Copy thereof to the Charger, all personal Diligence, and poinding of Moveables, must stop till the Suspension be

discussed.

7. In the Letters of Suspension there is a Day assigned to cite the Charger, which ought to be such as, according to the Distance betwixt the Parties, there may be sufficient Time to use Citation. But if a longer Day be appointed, the Charger may raise a Summons for shortning the same, thence called Summons pravento termino.

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SECT. IV.

Ordinaries at the Side-bar.

medit to Tromarbook this project va this EVERY Session Day (except Friday) one of the Lords comes, at Ten a Clock, to the Side-bar, to judge Causes depending before him, conform to his Hand-roll, and may continue judging there till Eleven, when he is fucceeded by another Lord, who may fit judging Caufes in his Hand-roll, till Twelve a Clock: And Two Lords only, in one Forenoon, should come to this By-bar successive (a). When any Lord happens not to go through all the Caufes in his By-bar Roll, he, at his next Side-bar calling, begins with the Caufe he formerly left at, and so proceeds to call all the Caufes in his precedent Roll, before calling any Causes in his subsequent Roll (b). There are no Ordinaries, for the Side-bar, the last Eight Days of a Session. ice study the saving meteraling, ber

SECT. V.

Lords Reporters.

I. FOR getting the Opinion of the whole Lords in any Cause, or Point of Difficulty, taken to avisandum by particular Ordinaries in their respective Provinces, in the outer House,

^(*) Ad of Seder. II Nov. 1708. (b) Ibid.

House, at the Side-bar, &c. Two Lords are allowed by Turns to make their Reports each Session Day, except Friday and Saturday, and upon Friday Forenoon Causes may be reported only by particular Appointment of the inner House, except that Friday which shall happen to be among the Five last Sederunt Days of a Session (a). Besides which ordinary Reporters, one of the Lords, in Course, is weekly appointed privileged Reporter, who

may report Causes any Day.

2. When any Ordinary agrees to report a Cause, or some Point therein, to the whole Lords, the Clerk writes, under the Minutes of Debate, avisandum to the Lords. Causes are reported, either with, or without Informations, according as the Point is more or less intricate. In case of a Report upon Informations, the Ordinary acquaints the Parties what Day he will do it. The Clerk brings the whole Process to the Ordinary a Day before reporting (b), that he may have Time to peruse it; and, the Night preceeding, both Parties put their Informations in every Lord's Box, and in the Clerk of the Process his Box.

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⁽a) Act of Sedere I February 1715. (b) Act of Seder. 13 December 1690.

SECT. VI.

Ordinaries upon Oaths of Parties and Witneffes.

i. OATHS are taken, either in the Seffion, or by Commission in the Country.

Witnesses upon Oath, Two Lords are appointed weekly in their Course, who, for that end, come to the Session-house, at Three a Clock in the Asternoon, and attend till Five, if there be Occasion, every Session Day except Saturday. In which Capacity they serve for Two Weeks, one of them being changed every Week. In ordinary Cases, any one of the Ordinaries may swear Witnesses. But, in Cases of great Moment, as Improbations, and proving the Tenor of Writs their Oaths are to be taken before the whole Lords, or both the Ordinaries, or before one of them, and some other Lord appointed to concur with him.

3. A Party is not bound to give his Oath, till he, who requires it, not only renounce all further Proof, but also depone that he hath no Writ to prove the Alledgance. When both Pursuer and Desender are present, and the Act, upon which the Oath is to be taken, in the Clerk's Hands, the Party is sworn, and the Oath signed by the Deponent, if he can write, and by the Ordinary. But if the Deponent cannot subscribe his own Name, it is

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marked in the Oath, that he depones he cannot write, and the Judge's Subscription serves for all.

4. If an Oath be clear, the Ordinary may write thereupon, this is a clear Oath, and fign the Writing, which doth warrant a summary

Advising thereof.

5. Witnesses will be received on the very Day, to which they were cited to compear, or any Day thereafter. Mean Men called as Witnesses, by Diligence, compearing upon the first Citation, get Expences modified to them by the Ordinary; but if they don't compear, till they are brought in by a Second Diligence, no Expences are allowed to them. Each of the Witnesses compearing ought to be examined separately, out of the Presence and Hearing of the rest. And if the other Party hath Objections why the Witness, to be examined, cannot be received, he will be heard thereupon before they are fworn. Some Perfons are fimply inhabile Witnesses, and cannot be received in in any Case; as Minors under Fourteen Years of Age, Fools, or fatuous Persons, or mad Men, Persons infamous, Women, except in some circumstantiated Cases for proving occult Crimes, or where only Women use to be prefent, Persons not worth the King's Unlaw, i. e. Ten Pounds Scots, Persons who come at the Defire of a Party, without lawful Citation against them; those who gave partial Counsel in the Cause, or who were prompted, or

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instructed in what Terms to depone, and engaged to depone so. Other Witnesses are inhabile only as to some particular Persons, viz. those within the Degrees defendant, by Blood, or Affinity, as Husband or Wife, Father or Son, Brother or Sifter, Uncle or Aunt, Nephew or Niece, who cannot bear Witness for the Party to whom they stand so related; Servants, and moveable Tenants, labouring Land for their Subfistence, who are not competent Witnesses for their Masters; and Perfons cannot be received to witness against those they bear Grudge or Malice to. Witnesses are rejected because of the Cause to be tried, if they have Interest therein, or Gain by the Event thereof.

6. Witnesses, who are not regulariter allowed to teltifie, are admitted sometimes when Truth cannot be discovered in any other manner, saving a Liberty of making Exceptions to the adverse Party, and leaving the Consideration of their Credit or Interest to the Judge: Which we call receiving Witnesses cum

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7. Objections against Witnesses being Dilators, must be instantly verified. If that cannot be done, the Objector may, at the same Time that the Witness is received, protest for Action of Reprobature, and prove his Alledgance in the second Instance, as accords of the Law. The Intendment of which Action of Reprobature is not, to quarrel the con-

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curring Testimonies of Witnesses upon Falshood, which cannot be done, but only to prove Incapacity or Corruption in a Witness, or to improve the Truth of the Preliminaries of the Deposition, concerning the Witness's Age, his being married or not, the free Goods he hath, &c. and his causa scientiae, as to which he is but testis singularis.

8. If no Objection be made against a Wirness, or the Objection made, repelled, the Judge swears the Witness to be examined (a). Then asks him about his Age, and whether he be married or not, and purges him, that is, makes him swear, that he gave no partial Counsel in the Cause, that he bears no ill Will to either Party, that he hath received no good Deed, or Promise of good Deed to depone in the Cause; that no Person taught or instructed him how to depone; that he is not to be a Gainer or Loser by the Cause. The Witness being thus purged, the Judge proceeds to interrogate him upon the Points to be proven.

9. Oaths are taken by Commission, upon the Compearance of Parties before the Commissioner, within the Time prefix'd, in the same manner as before the Lords, with this Speciality, that these and any Writs laid before the Commissioner, are instantly seal'd up by him, and directed to the Clerk of the Process.

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SECT. VII.

Ordinary upon the concluded Causes.

1. FOR examining and preparing States of concluded Causes contained in a Roll, called the Roll of Causes to be prepared, one of the Lords is appointed weekly (a), who comes every Tuefday and Thursday at Three a Clock to the Seffion House, and fits till Five (b); where he is attended by the inner House Clerks, who lay before him, according to the Order of the Roll aforesaid, the Processes to be prepared, and States, i. e. Abbreviates thereof drawn themselves. Which Processes are called in the Order of the Roll aforefaid, and Parties Procurators allowed to make Objections against the State form'd by the Clerk, and to present another if they think fit. If the Ordinary, after comparing the State or States with the Act, Writs and Depositions, find any Thing amiss, he corrects the same, or frames another State. When the State is adjusted, the Ordinary signs it, and modifies the Clerk's Dues for preparing, to be instantly paid to their Collector by the Parties (c). Then it is called a prepared State of the Process, and the Cause may be entred upon the next or any subsequent Saturday Afternoon, in 003

⁽a) Act 17. Seff. 4. Parl. W and M. (b) Act of Seder. I Nov. 1693. (c) Act of Reg. 1696. Art. 7.

in the Book of Involment of concluded Causes for the inner House, in order to be there advised. Which prepared State is to ly in the Hands of the Clerk of the Process, patent to all Parties a Week before advising.

Oath (a), or by Writ or Wicnesses (b) to be clear, he may mark it to be so, in order to summary advising thereof, without Order of

the Roll.

SECT. VIII.

Ordinaries in Count and Reckonings, and Rank-ings.

Action of Count and Reckoning is called by the Regulation Roll, or a Process of another Kind, resolves into A Count and Reckoning, doth, at the same Time that he assigns a Day to the Desender or Accountant, if compearing, to produce to the Clerk of the Process, a Charge against himself, and his Discharge, name the Lord who salls to be Auditor in the Count and Reckoning (c); and the Ordinary, who in a Process of Sale and Ranking assigns a Day for the Creditors to produce their Rights and Interests, doth at the same

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⁽a) Act 17. Seff. 4. Parl. W. and M. (b) Act of Regul. 1695. Art. 22. (c) Act of Seder. 22 November, 1711. 9 4.

Ch. 2. Law of Scotland. Tit. 1. § 8. 215

Time name the Lord who falls to be Ordi-

nary for ranking them (a).

2. If the Defender or Accountant in a Process of Count and Reckoning, neglect or refuse to charge himself, he will be held as confess'd upon the Charge given in by the Purfuer, after his deponing de calumnia thereupon . And where any Part of the Charge given in by the Defender is deceitfully omitted, or he, being principally liable to count, conceals any Part of his actual Intromissions, he is liable in the Double of what is so omitted (b). The Defender should with his Charge against the Day appointed give in a Copy of his Discharge, both sign'd by him if present, or by his Procurator if ablent, with the Vouchers and whole Instructions he is Master of: Otherwise he will not thereafter be heard upon any new Article, unless made appear to be recently come to his Knowledge, and that then, if in culpa, he pay a Mulct to the other Party for his Expence of the Delay, to be modified by the Ordinary (c). But it is always free to the other Party to make up add to the Charge, or to object against the Discharge, as accords.

3. If any of the Creditors in a Process of Sale and Ranking, fail to produce their Rights
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⁽a) Act of Seder. 23. November. 1711 6 6. (b) Act of Seder. 22 November, 1711. 6 2. (c) Ibid 5 3.

and Interests, within eight Days of the Day affigned for that Effect, they are not allowed to produce thereafter, without paying a pecuniary Mulct, to be modified by the Ordinary, and applied for defraying the Charge of the Process. The Ordinary prefixes a Time for the Creditors producing their Interests, to depone upon the Verity of their Debts: Who, if they fail to do it at the Day appointed, are not allowed thereafter, but upon Payment of a Mulct to be modified and applied as above (a). If they depone before the Ordinary himself, he advises their Oaths. But if they depone upon a Commission, or before another Ordinary (as when the Ordinary of the Ranking is fick, or out of the House) the Ordinary in the Ranking cannot advise their Oaths without a Remit to him for that Effect, upon a Bill given in to the Lords.

4. The Ordinary in a Count and Reckoning, after the Charge and Discharge is produced (b), is authorized to appoint one or more Advocates not imployed in the Cause, or other proper Persons, to consider the whole Accounts with the Writs and Instructions, and thereupon to state the Points in Controversy. And the Ordinary in a Ranking, after the Rights and Interests of the Creditors are produced (c), is impowered to appoint one or more such Advocates, to consider the whole Production, and make

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make a State of the Interests produced, and Points of Controversy. These Delegates in both Processes respective must adjust the Minutes for the Ordinary, to give his Interlocutors upon the whole. The State when prepared is to be marked, and the marking dated by the Delegates, and then to be lodg'd in the Clerk's Hands. These Delegates have, for their Pains and Attendance, such Allowance in a Count and Reckoning, from both or either of the Parties, and in a Sale and Ranking out of the Bankrupt's Estate, as the Lord Ordinary doth modify.

for the same Subject, as having affected it by personal or real Diligence, according to the Nature thereof, they are ranked and preferred according to the Rules of Law.

SECT. IX.

Bufiness of the Lords in the inner House.

1. NINE ordinary Lords, that is, Eight with the President, are a Quorum (a). Matters are determined by the Plurality, the President having only the casting Vote, where the rest of the Lords are equally divided in their Opinions.

2. The extraordinary Lords sit only here, when they are pleased to come, and vote with

(a) Ad 44. Parl. 11. Jam. VI.

the collegiate Body. But as they are not of the Quorum, so they never go to the outer House, nor judge in any separate Capacity by

themselves, as the ordinary Lords do.

3. All Matters are advised and voted with open Doors, except some special Cases, wherein all are removed save the Parties and their Procurators: And none may presume to speak after the Lords begin to advise, unless by them desired (a). What the Lords do here is said to be done in prasentia, in Presence, that is, in Presence of the whole Lords, or a Quorum of them.

4 Every Session Day, except Friday (b) and Saturday, immediately after Nine a Clock, when the Lords have taken their Seats on the Bench, the Lord Reporter first in Course takes his Chair, 'at the End of the Clerks Table, and reports the Causes one or more he has made Avisandum with. When the Cause or Point reported is sufficiently understood, the Lords determine the same. But if it be intricate or new, they fometimes ordain the Caufe to be inrolled in the inner House Roll of ordinary Actions, sometimes in the Roll of Causes to be fummarly heard in Presence, called the President's Hand-roll. The first Lord having finished what he had to report, the other Ordinary takes his Place at the Table, and reports his Causes. When a Cause or Point is reported

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⁽a) Act 26. Seff 4. Parl. Will and Mary. (b) Act of Seder. Feb. 1715.

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ed upon an Amand, if the Lords repel the Alledgance of the Party who fought the Report, the Amand is put immediately in the Poors Box; but if they alter the Ordinary's Interlocutor any way, or think the Point doubtful, the Amand is restored to him who configned it. These Ordinaries having reported their Causes, come to the By-bar in the outer House, and report to the Procurators of the Parties the Interlocutors of the Lords, and apply the same by affigning Days, or decerning, without hearing any new Point (a). After advising Reports of the Ordinaries, the President fometimes reports Causes formerly heard in Presence, concerning which, Informations by Appointment of the Lords were given in to the Boxes.

Bills or Petitions concerning Causes depending, either before themselves, or before single Ordinaries in their respective Capacities in the outer House, which had been given in to the Boxes the Night preceding to be perused. Each inner House Clerk, in his Turn, moves such Bills as he has in his Hand. Upon advising Bills, to which Answers are made, the Lords adhere to, or alter the Interlocutors reclaimed against, as they see just; or in Cases of Difficulty allow the Parties to be heard in Presence. The Desire of new Bills is granted, if manifestly reasonable, resused, if groundless,

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⁽a) Act of Seder. 20 Nov. 1711. 6 50

and the Bill is ordered to be feen and answered, if the Matter appear doubtful. Bills reclaiming against any Ordinary's Interlocutor, must be presented within Eight Sederunt Days, after fubscribing the Interlocutor, and Bills reclaiming against Interlocutors in Presence, must be offered within Six Days of the pronouncing (a). The Clerks are not to receive more as Two reclaiming Bills from the same Party, against one Interlocutor in Presence; nor are they to receive the Second, but apon the Petitioner's configning Twenty Shillings Sterling to be delivered to the other Party in case of Refusal, and to be given back to the Configner, if the Bill be not refused. Further, the Lords will not receive or hear any Third reclaiming Bill, unless upon new Matter of Fact, and sufficient Evidence given to verify that it is recently come to the Party's Knowledge (b). Against an Interlocutor decerning, or affoiling from Expences, pronounced by an Ordinary, only one reclaiming Bill is allowed; and against fuch an Interlocutor pronounced by the Lords in Presence, no reclaiming Bill is indulged (c). Only Bills without Answers are put in the Boxes on Thursday Afternoon, and advised on Friday Forenoon, except Bills and Answers specially appointed to be then advised, or such as remain unadvised of Bills and Answers given in that same Week. Bills only that pass of Course,

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⁽a) Act of Seder. 8 July 1709. (b) Act of Seder. 20 Nov.

or those upon extraordinary Emergencies, are put in the Boxes on Friday, and advised on Saturday. But this Regulation is not observed on any Friday or Saturday, among the Five latt

Sederunt Days of the Term (a).

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6. After the Bills are confidered, Caufes peculiar to the inner House are called, beginning with particular Causes, if any be, appointed to be heard on that Day. These being difcussed, Causes are called, according to the Order they stand in the respective Rolls. Roll of ordinary Actions, or the President's Hand-roll, (as his Lordship pleases) are called upon any Day of the Week, except Saturday. The Causes in the Hand-roll appointed to be heard on a certain Day, should be peremptorily called and discussed that Day, according to the Order and Date of the Deliverance, before any other Cause be called (b).

7. Saturday is fet apart for discussing Caufes, wherein Proof is given by Oath of Parties and Witnesses, or by Writ. The summary Roll of Causes, wherein the Evidence is marked clear, is first discussed. Then the Lords proceed to the ordinary Roll of concluded Causes. calling of a concluded Cause, the Pursuer's Advocate may bar the Defender's Advocate, if he has not paid his Half of the Dues, for preparing and inrolling (c), till he pay the whole (d). When both Parties are allowed to

⁽a) Ibid (b) Act of Regul. 1695. Art. 15. (c) Act of Regul. 1696. Art. 7. (d) Act of Sed. 20 Nov. 1711. 9 12.

be heard, the Clerk reads the prepared State, against which any Party may object. If the Party, against whom Witnesses are produced, hath concluded a Summons of Reprobature against them, the Reprobature must be advised, before the Testimonies of the Witnesses quarrelled are considered.

Both Parties having pleaded what they had to fay upon the Evidence, in the prepared State, the Lords advise the State, Objections

and Answers, and give Sentence.

8. If the Pursuer be not ready at the calling of any Cause, in the inner House Rolls, the Lords, as the Defender desires, and they see just, either score out the same to be inrolled de novo, in common Form, or proceed to the Cause as accords; against the Determination in which Proceeding, the Pursuer will not be heard, without paying Twenty Shillings Sterling to the other Party: If the Defender be not ready, an Act, or Decreet, or other Interlocutor, as the Pursuer craves, and the Lords see just, will be pronounced, and not recalled but upon Payment of the like Sum of Twenty Shillings to the adverse Party (a). When the Lords, at the Conclusion of any Cause, find the conquered Party to have been calumnious or litigious, they take in an Account, upon Oath, from the Party prevailing, of the Costs of Suit, and decern for the same, if moderate and probable, or tax and modify thele

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nious Alledgances (b).

9. When any Interlocutor is voted, it must be writ upon the Process, and signed by the President, before a Quorum of the Lords sitting in Judgment (c). Deliverances on Bills being signed, are intimated in the outer House, by the Under-clerks, to all Parties concerned.

Forenoon, but also they do meet often, in a Body, in the Afternoon, to advise complex and perplexed Causes, that cannot be conveniently extricated in a Forenoon; or to advise Bills and Answers, when so multiplied in the latter Days of Session, that they cannot

be overtaken at the ordinary Time.

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⁽a) Act of Regul. 1695. Art. 23. (b) Act of Seder. 20 Nov. 17 11. 5 14. (c) Act 18. Self. 4. Parl. W. and M.

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⁽a) Act of Regul. 1695. Art. 23. (b) Act of Seder. 20 Nov. 1711. 6 14. (c) Act 18. Self. 4. Parl. W. and M.

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TIT. IL

The Method of commencing, carrying on, and finally determining Causes.

AUSES are brought before the Lords, either in the first Instance, as ordinary Actions; or in the second Instance, as Advocations, Suspensions, and Reductions of Decreets.

SECT. I.

Of ordinary Actions.

1. OR DINARY Actions proceed upon Summonfes duly executed, at the Inflance of the Pursuer against the Defender.

2. After elapsing of the last Day of Compearance in the Summons, the Defender, if he find the Pursuer backward to insist in his Cause, may deliver the principal Copy, given him, to an Under-clerk, and cause him put up a Protestation for not insisting. After extracting whereof, the Defender is not bound to answer till he be cited again, and the Protestation Money, which is Fifteen Pounds Scots, paid him, with all his Expences.

3. When the Pursuer intends to insist, he causes an Under-clerk call his Summons in the outer House, after the Session Bell is rung. Upon

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Upon which Calling, if no Advocate's Servant defire his Master to be marked for the Defender, the Summons goes to the Regulation Roll: And if, at calling the Cause by Course of that Roll, none do yet appear for the Defender, the Lord Ordinary, in the outer House, pronounces Act, or Decreet in Absence, as the Pursuer desires (a). But if then Appearance be made for the Desender, his Advocate will be allowed to see the Process in the Clerk's Hands, and to be ready to debate at the next

Calling.

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4. If, at the first calling of a Summons by the Clerk, an Advocate's Servant crave to have his Master marked for the Defender, the Process is given out to him to be seen, with a dated Indorfement on the Summons, mentioning what Writs are given out, fign'd by the Pursuer's Advocate, called an Outgiving. Which Process, must, after fix Days, be returned by the Defender's Advocate, with his figned Writing thereon, such a Day seen and returned by me, which is called a Return. And if Process be kept up longer by the Defender's Advocate, upon a Complaint thereof by the Pursuer's Advocate to the Ordinary upon the Bills, his Lordship will fign a Caption against the Advocate's Servant who got out the Procels (b).

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⁽a) Act of Regul. 1695. Article 218 (b) Act of Seder. 14. November 1691.

5. The Process, when duly returned, may upon the next Saturday be got inrolled in the Book of Involement of ordinary Actions for the outer House, by applying to the Keeper thereof at any Time betwixt Two and Four in the Afternoon. After which Involment, it comes to be heard in the outer House by Course of the Roll put upon the Wall, the Process being lodged in the Clerk's Hands before the calling. But some Causes are privileged to be called after feeing and returning, without Entry in the Book of Involment, as the King's Caufes, Process of Count and Reckoning, Actions of Sale, Actions of Aliment, Actions for Ministers Stipends, College Rents, and Schoolmasters Fees, second or posterior Adjudications, and Actions of Bonorum; which go to the Regulation Roll, after they are feen and returned. Actions of Transference of Processes, upon the Death of the Defender, are also called summarly; and Actions against absent Persons, cited for Contempt of the Lords Authority, or for invading or attacking their Adversaries with whom they have Process depending, or Actions continued against Persons called incidenter, are summarly discussed.

6. When the Cause comes to be called before the Ordinary, according to the Course of
the Roll, the Pursuer compearing, if the Defender be absent, may get a Decreet for the
craving. But when he cannot instantly prove
his Libel, he chuses rather to take a Term to

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which being affigued to him, is called an Act of Litiscontestation reo absente, or parte non comparente. A Decreet, or Act, or other Interlocutor so pronounced in Absence of the Party, must be signed the same Day (a). If the Pursuer's Advocate be not ready, the Ordinary will score out the Cause, to be inrolled again in the ordinary Form, or at the Desire of the Desender compearing, grant Protestation for not insisting (b), but the surest Way for the Desender is, to raise a Summons against the Pursuer to insist, with Certification, that, if he do not, he should never be heard thereafter.

7. If both Parties compear, the Advocate for the Pursuer repetes his Libel, and the Advocate for the Defender propones his Defences dilatory, and of those such as are declinatory first, if he any has. All which Dilators must be propounded at one Time (c), and instantly verified: Except Dilators peremptoria causa, i. e. those proponed as Peremptors, upon the Verity whereof the Defender ventures the Cause, for proving whereof a Term will be assigned.

8. In some Causes, as Declarators of real or heritable Rights, proving of Tenors, and Pp 2 Actions

⁽a) Act of Seder. 8 July 1709- (b). Act of Seder. 20 Novem. 1711. 55. (c) Ibid. \$ 16.

Actions Bonorum, when dilatory Defences are discussed, the Ordinary in the outer House proceeds no farther therein, but makes great Avisandum with them to the Lords in Presence. Upon which these Causes must be entred in the Books of Involment of ordinary Actions for the inner House, where they are to be determined in their Course (a). But in other ordinary Causes, Dilators being overruled, the Defender makes his peremptory Defences. Which must all be propounded, at least before an Application of Report to the Lords in Prefence; otherwise they will not be received, unless recently come to Knowledge, and the Proponer pay a Mulct to the other Party for his Expences (b). The Purfuer replies to the Defences respectively in their Order, and the Defender duplies, Oc.

9. Persons interested may compear for their Interest, without being cited, and oppose the Pursuer's Claim; so be they instantly verifie their Interest, and produce their Rights over the Bar, at the Calling of the Cause. When an Interest is produced, the Pursuer is allowed to see it, and the Producer to see the Process, and both Parties ordained to be ready at the next Calling. This is term'd Compearance incidenter, or Compearance for one's Interest:

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⁽⁶⁾ Act of Regu's 1672. concerning the Selfs Article (6) Act of Seder, 20 Novems 1711. § 16.

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10. The Relevancy of Alledgances binc inde is commonly determined, before admitting any Point to Proof. If clear, the Ordinary determines it presently, and in case of Difficulty makes Avilandum therewith to himself, or to the whole Lords. If the Ordinary pronounce an Interlocutor to the Diffatisfaction of either Party, he who thinks himself lesed, may crave the Lords Answer, i. e. that the Ordinary would report the Cause to the whole Lords, and get their Opinion in it; if that be refused, he, the Party, may crave it again, upon offering an Amand, i. e. a Dollar to be forfeited to the Poors Use, if the Lords adhere to the Ordinary's Opinion. When the Ordinary refuses, notwithstanding such Offer, to report the Point, the Lords Answer may be got upon a Bill given in by the Party. If the Ordinary accept of the Amand, the Cause goes to Report.

concluded, Proof of the Matters of Fact alledged by the Parties, fall under Confideration. Some Facts want not to be provid as Negatives, notoria, and Things justly presum'd. Others are instantly verified by Writs produced: As to which the Defender should dispute, both the Relevancy and Proof at the same Time, otherwise he will be presumed to acknowledge either of these, against which he doth not object. A Third Sort of Facts require a Term for proving them. As to which, either Party may

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require the Oath of Calumny of the other, or his Advocate. If the Party, whose Oath of Calumny is crav'd, be present at the Bar, he may be commanded instantly to give it. If he be not present, the other Party will get a Diligence to cite him to compear, which, in order to hold as confelt, must be executed against him personally apprehended. Where the Proponer of an Alledgance (whose Oath of Calumny is crav'd) swears affirmative, that he believes fuch a Fact to be true, or the other Party passeth from his Oath, he is free to infift therein, as if his Oath had not been required. If he depone negative, that he doth not believe it to be true, or be held as confest for refusing to swear; he cannot thereafter insist on such a Point. But an Oath of Calumny given by one Party, to the prejudice of the other, doth not determine the Matter fo, as to hinder that other to prove otherwise. But now Oaths of Calumny are of less Use. Because the Party, against whom any Fact requiring a Term for proving, is alledged, or his Advocate is obliged, before Interlocutor, to confess or deny it, and upon Refusal to do so, will be held as confest (a).

verified, the Lord Ordinary admits the same to Proof; and determines the Manner of Proof. If either Party have in his Hands Writs to be us'd by the other for proving an Alledgance, and

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⁽⁴⁾ Act of Seder. 1 Feb. 1715.

and don't instantly produce them, but occasion the assigning of Terms, or taking out Diligence to recover them, while he himself hath them, he is liable to a Mulct not under 40 sh. Sterl. to the other Party (a). If the Defender, to whose Oath a Point is referr'd, was cited personally, his Procurator must take a Day to produce him, otherwise he will be held as confest. But if the Citation was not given to him personally, and he hath not compeared to propone Defences, he cannot be held as confest. Where the Libel or Reply is to be prov'd by the Deferder's Oath, his Procurator should protest for a qualified Oath, if the Circumstance of the Case require it; and the other protests the contrary.

either to the Pursuer or to the Defender, or to both joyntly for proving the Libel or their respective Alledgances, according to the Nature

and Relevancy thereof.

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Libel or Reply, the Oath of Verity of the Defender who was not cited personally, or when either Party is to prove his Alledgance by Witnesses, a Diligence is crav'd and granted for citing the Party, or Witnesses respective to depone. If they cannot come to Edinburgh to depone, a Commission is crav'd, to some Person or Persons, to take their Oaths in the Place where they live. Which, if the other Party consent to, may be granted by the Ordinary:

P p 4

⁽a) Aft of Seder . 20 Novem . 1711.

But if he dissent, Application must be made for it to the whole Lords; who, if the Reasons be vouched by Testissicates from Persons of Credit, or consist with the Knowledge of any of the Lords, will grant Commission. But in extraordinary Cases, and some particular Actions, as Improbations and proving of Tenors, the Lords resule to grant Commissions for taking Oaths. If either Party offer to prove by Writs not in his own Hands, he seeks and gets a Diligence against Havers of these Writs: And the other Party craves that his Objections contra producenda may be reserved, which is always done.

15. When the Ordinary pronounces his Interlocutor, determining the Relevancy and Manner of Proof on both Sides, and affigns Terms for proving thereof, this is called Litif-

contestation parte comparente.

16. Sometimes, as in dark and intricate Cases, the Ordinary, after hearing of the Debate, doth ex nobili officio, without determining the Relevancy, allow both Parties before Answer to prove such Points as his Lordship thinks fit. And upon such an Interlocutor, an Act may be extracted, called an Act before Answer.

and instantly instructed, and no Desence or Exception is sustained relevant to be proven, or the Exceptions are repelled in respect of the Replies instantly verified; or the Replies are repelled

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pelled in respect of a Duply instructed: The Ordinary may decern, which is called a Decreet without Litiscontestation. For the Ordinary may advise and determine upon Writs produced for Interest or Proof, and the Oaths of Parties compearing, which require no Act of Litiscontestation. But whatever is produced after Litiscontestation ad modum probationis, can only be advised and determined in Presence.

18. All Interlocutors, Decreets or Protestations upon Debate, must be signed by the Ordinary at farthest within six Days, after pronouncing, otherwise they're null: Except Interlocutors upon Debate the two last Days of the Session, which are to be subscribed within 48 Hours of the pronouncing. Interlocutors signed after the Session is up are also null. Where Interlocutors are not subscribed of the Date of pronouncing, the Clerk should presix to the Minute, the true Date of the pleading and pronouncing, and subjoyn to the Interlocutor the Day it was signed. Acts, Decreets and Protestations are put up in the Minute-book, of the Date when they are signed (a).

the Interlocutor in Act or Decreet pronounced, he applies to the Ordinary, for a further Hearing; and if that cannot be had before the Time that the Act or Decreet may be extracted, it is necessary to procure from his Lordship a Stop to the extracting, which Stop must be subjoyn-

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⁽a) A& Sader. 8 July 1709.

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ed to a Representation of some relevant Ground, whereupon he who craves it ought to be heard: For verbal Stops are ineffectual (a). Where extracting is stopp'd indefinitely without Mention of a particular Day, the Stop continues not above a Fortnight in Time of Seffion, or if granted during the Vacation, expires after the Eighth Day from the downsitting of the next Seffion, except it be renewed (b). If a Stop be not sought from the Ordinary in due Time, Application must be made for it, by a Petition to the whole Lords, within Eight Days after subscribing the Interlocutor (c). After the Cause goes to the inner House, the Ordinary is exauctorated, as to Points determined by, or depending before the Lords in Presence; and can hear only new and separate Alledgances. If the Party grieved feek ne Stop, or the Stop fought be refused, the Act or Decreet may be extracted, when 24 Hours, after reading thereof in the Minutebook, are elapsed (d).

20. Upon the extracted Act Letters of Diligence (if there be a Warrant for them) may be issued forth, authorizing Messengers at Arms to charge the respective Parties, Witnesses or Havers of Writs, according as the User of Diligence has Occasion, to compear before the Lords, or before the Commissioners, where

(a) Act of Seder. 11 Novem. 1708. (b) Ibid. (c) Act of Seder. 8 July 1709. (d) Vid. supra B, 1. Cl. 2. Tit. 1. 5. 3. N. 0.

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they are to be examined by Commission, on the Day assign'd for Proof to give their Oaths, or to produce Writs. Which Diligence is signed by one of the inner House Clerks, and pas-

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21. The Term in the Act being passed, when the Defender's Oath is only required, the Purfuer calls his Act, and craves that the Defender may be held as confeit, and the Term circumduc'd against him for not deponing. It the Defender compear not at Calling of the Act, Decreet of Circumduction holding him as confest, will be given. But if he compear and be ready to depone, the Ordinary causes him to make Faith, that is, swear with his right Hand uplifted, that he shall declare the Truth: And then bids him wait on in the Afternoon viz. to give his Oath before the proper Ordinary. In which Case the Pursuer is oblig d to furnish the Defender with an A& to depone upon; otherwise the latter may be dismiss d (b).

Parties to prove his Alledgance, he, if he hath recovered the Writs he wanted, will probably call the Act after elapfing of the Term: But if he be not Master of these, the other Party may call the Act, and crave the Term to be circumduc'd against him for not proving. In which Case the Party, on whom the Proof

⁽e) Act 40. Seff. 5. Parl. K. W. _ (b) Act 10. Seff. 2. Parl. Jam. VII.

lies, may, upon his reporting an executed first Diligence, in order to stop Circumduction, crave and get a second Diligence, which bath the Essect of a Caption. But, without Production of a first executed Diligence, he will not

get a Second.

ligence, or brought in upon a Second, offer to give their Oaths, the User of the Diligence delivers the Act to the Clerk, who, upon seeing these to depone, standing at the Witnesses Bar, causes a Macer any Time in the Forencon, call both Parties and their Advocates to the Bar, before the Ordinary in the outer House, to whom he intimates the Design of calling the Act, and the Ordinary causes the Persons cited to make Faith, and bids them wait on in the Asternoon, before the Ordinary to Oaths and Witnesses.

dispatch those charg'd thereby, thro his not calling the Act in order to their deponing, they require him to do it, and protest that otherwise they may be free from the Essect of the Diligence, by taking Instruments in the Hands of a Notary, before Witnesses.

25. A competent Time being allowed for taking the Depositions of Persons cited by Diligence, the other Party doth, on the next Act-day, cause call his Act again; and if no Writ be then produced, gets Decreet of Circumduction, for not proving by Writ in the Terms of

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of the Act. But the Ordinary sometimes circumduces conditionally, and supersedes extracting, allowing the other Party to produce betwixt and a certain Day, and those who have not yet given their Oaths to depone in the interim. When Writs are produced, avisandum is made therewith to the Lords in the inner House; and the other Pary protests to be heard upon his Objections, at advising the Cause, and craves Circumduction of the Term quoad ultra. Upon which the Ordinary makes avisandum, and circumduces quoad ultra.

26. Diligences against Witnesses are executed in the same manner, as against Havers of Writs, and the Witnesses are brought in to make Faith, in order to depone afterwards before the Ordinary, and avisandum is made with their Oaths after deponing, in the same

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27. Where Witnesses and Havers of Writs are under Caption, and dare not compear, the Lords, upon Application, will stop Execution of the Caption for some Time, that they may freely come and give their Oaths.

28. Where Oaths were appointed to be taken by Commission, the other Party, at calling of the Act, craves that the Term may be circumduced, for not reporting the Commission. If the Commission be reported, duly executed, and delivered at the Bar to the Clerk, avisandum is made with the Deposi-

tions, in the same Manner as if they had been taken in the Session.

29. Where a Point was allowed to be proved prout de jure, the Party undertaking to prove, tho' he hath ferv'd Diligence against Witnesses or Havers of Writs, will be allowed at calling the Act in termino, to refer the same to the other Party's Oath of Verity: Which hinders Circumduction of the Term, or granting of Certification, till that other Party depone. And where the Purfuer or Defender hath brought in Witnesses, or Havers of Writs, for proving a Point admitted to his Proof; the other Party may, upon a Petition to the Lords referring the Matter to the Pursuer or Defender's Oath, hinder fuch Witnesses or Havers of Writs to be examined. But after any Mean of Proof hath been given, this Rule is to be observed. If Writ be first produc'd in Evidence, the Defect of that Proof may be fupply'd by the Party's Oath. Where Witnesses depone only that they know not, or remember not, Writ may be us'd to prove the Point, and Oath of Party, in fo far as the Writ doth not prove But if Witnesses have once deponed positively, Parties are not allowed to alter their Mean of Proof; and after a Party's Oath of Verity is taken, there's no Place for Evidence by Writ or Witneffes. But if a Party be not positive, another Kind of Proof may be admitted ex officio nobili .

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30. Proof is led upon Acts before Answer, in the same way as upon ordinary Acts of Litiscontestation. And if, at calling such Acts before Answer, nothing in Evidence be produced by either Party, the Term will be circumduced for not proving: But the Decreet of Circumduction cannot be extracted, for the Relevancy wants to be determined. In order to the deciding whereof by the Lords in Presence, avisandum is made with the Rele-

vancy and Proof.

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31. Avisandum made with Proof in a Cause, is called a great avisandum: Because, thereby the Cause is concluded, and regularly is no more judg'd or tried by a fingle Ordinary. Upon this avisandum, a Warrant is given by the Clerk, for entring thereof in the respective inner House Roll it belongs to. When Proof is adduced upon ordinary Acts of Litiscontestation, wherein the Relevancy is already determined, if it be not marked clear, the Cause must be inroll'd in the Roll of Causes to be prepared. Then a State thereof is prepared by the Ordinary on these Causes (a): Who, if he find the Proof by Writ or Witnesses to be clear, marks it to be so, in order to be fummarly advised. But if the Proof be not clear, the Cause must be inroll'd in the Roll of concluded Causes. When great avisandum is made with Proof by Oath of Party, marked to be clear by the Ordinary

⁽a) Vid. fupr. Tit. 1. 9 7-

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nary to Oaths and Witnesses, or with Proof by Writ or Witnesles, marked clear by the Ordinary to preparing concluded Caules, or with Proof marked to be clear by an Ordinary, to whose Consideration it was remitted by the Lords, upon a Petition presented to them for that effect by the Party; the Process is inroll'd in the Roll of Causes to be fummarly advised. But when Proof is produced upon Acts before Answer, and great at visandum made with both Relevancy and Proof. the Cause is entred in the Roll of ordinary Actions for the inner House. However in such a Cafe, the Lords, upon Application by Bill, remit the Cause to be discuss'd by the former, or any other Ordinary.

32. The Manner of hearing and determining Causes in the inner House hath been ex-

plained in another Place (a).

SECT. II.

Of Advocations.

r. CAUSES are advocated from inferior Courts, either by the Pursuer, or Defender.

2. When the Defender hath raised Advocation, the Pursuer, after elapsing of the first Diet of Compearance therein, causes one of the outer House Clerks put up a Protestation

(a) Ibid. 5 9-

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and Remir. Which, if the principal Advocation be not thereafter, in due Time, produced, may, after the Second Diet therein is past, be extracted, and Letters of Horning, for Payment of the 17 L. of Protestation Money, raifed thereon. And this brings back the Caufe to the inferior Court, as if it had never been advocated. But extracting of fuch a Protestation may be hindred, r. By requiring the Craver of it to condescend on the Date of the Advocation : But this Stop is taken off by intimating, in the outer House, to the Party concerned, that the Advocation is dated on some of the Days, of one or other of Two particular Months in fuch a Year. 2. No Protestation can be granted after elapling of Year and Day, from the last Day of Compensance in the Letters of Advocation, upon which Ground the Protestation, put up in the Minute-book, will be scored. But, after raising and executing & Summons of Wakening, and expiring of the Days therein, a new Protestation on the Wakening may be put up. 3. Extracting of the Protestation is stopped by producing the principal Advocation, or an Extract thereof out of the Signet-office.

3. The Advocation being produced to the Advocate, for the Pursuer in the principal Cause, he, after taking a Note of the Reasons of Advocation, gives out the principal Process to the other Party's Advocate to be seen, and therewith resums the Advocation. Which

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Process, being seen and returned, is, upon the next, or any subsequent Saturday, entred in the Book of Involment of Advocations and Suspensions, conform to the Date of the Return.

4. At calling of the Caule, in the Course of the Roll, before the Ordinary in the outer House, if the principal Process be not produced, the Advocater producing his Advocation, may get the Cause to be advocated, till the principal Process be produced, or crave the Advocation to be scored out of the Roll. If, at Calling, the Pursuer produce his Process, and the Advocation be not produced, the Pursuer may get a Protestation and Remit: Which is a Kind of a Decreet of Absolviture, and is called a judicial Protestation. After which Protestation, (which may be extracted within Twenty Four Hours after reading thereof in the Minute-book) unless the Cause be again called by the Ordinary, and the Advocation produced the same Week, it cannot be taken in by the Clerk, or the Party in mora reponed, without paying to the adverse Party, or to the Clerk for his behoof, Ten Shillings Sterling (a).

of the principal Cause repeats his Libel, and all the Steps of his Process before the inferior Court, and then craves that the Ordinary would remit the Cause. The Advocater refumes his Reasons of Advocation, and offers in

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⁽a) Act of Seder. 1 January, 1709.

Ch. 2. Law of Scotland. Tit. 2 § 2. 243

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instantly to verify and prove the same. The other Party answers thereto, by either impugning the Relevancy, or alledging, that, tho the Reasons were relevant, yet the same are not instantly verified. For all Reasons of Advocation must be either a Point of common Law, or a Matter of Fact notourly known, or must be instructed by Writs instantly produced, or by Oath of Party: And no Term will be assigned to prove by Witnesses, or to recover Writs for proving by a Diligence, unless Matters of Fact be alledged, and offered to be proven upon the Peril of the principal Cause.

6. Reasons of Advocation are founded, either upon the Incompetency of the Judge, or upon just Suspicion of Prejudice from him by Partiality, or Iniquity committed by him.

A Judge is incompetent, 1. Because the Defender is exempted from his Jurisdiction. A Person may be exempted from the Jurisdiction of an inferior Judge, either because he lives not within his Territory, or upon the account of some special Privilege, as, because he is a Member of the College of Justice (a). 2. A Judge is incompetent, in respect of the Cause, when it falls not under his Cognizance.

Prejudice may be suspected from a Judge, through Partiality, 1. When he is within the prohibited Degrees of Consanguinity, or Affinity to the Pursuer. Which are the same in O q 2

⁽a) Act 39. Parl 6. Q. M. Act of Regul. 1672. comments Self. Art. 16 and 17.

244 Part IV. Institutes of the Book II.

inferior Judges, as in the Lords of Seffion (a).

2. When he hath Interest in the Cause (b).

Iniquity may be committed, either in determining the Relevancy of Alledgances, or, in the Form of Process, or in respect of the Proof.

7. If Reasons of Advocation be repelled, either because not relevant, or not instantly verified, the Cause is sent back to the Judge from whom it was advocated by an Intersocutor, called an Ast and Remit; and the Raiser of the Advocation, ordained to pay 15 L. of Expences, called Remit Money, which is the ordinary Expences. Where the Advocater hath been very litigious, the Lords sometimes add further Expences to be paid by him. But where he had probable Ground for advocating, the Ordinary remits the Cause without Expences.

8. Causes are advocated, either by Consent of Parties, or in jure. When a Cause is advocated of Consent, either both Parties agree instantly to plead the principal Cause, as if the same had been originally commenced before the Lords; or, if the Cause be intricate, the Desender is allowed to see the Process in the Clerk's Hands, and appointed to debate at the next Calling.

A Cause is said to be advocated in june, when the Reasons are sustained relevant and proven, and the Action found competent to be judged only by the Lords of Session.

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^() Vid. fupr. B. r. Chap. 2. Tit. 7. (b). Thid-

Ch. 2. Law of Scotland. Tit. 2. 9 2. 245

Whereupon, if the Party, against whom Advocation is raised, consent at discussing the Reasons, the principal Cause is to be discussed fummarly, without an Act, against the Time

appointed by the Lord Ordinary (a).

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9. In some Cases, the the Reasons of Advocation be relevant and proven, the Cause is not advocated to the Lords, but remitted to the inferior Judge, from whom it was called up to the Seffion, with Instructions how to proceed: As when the Matter is inconfiderable, or properly belongs to the Cognizance of that inferior Judge in the first Instance. Sometimes again a Cause may be advocated in jure, and yet neither infilted in before the Lords, nor remitted to the Court from which it was removed, but will be fent to another inferior Judge, who only is competent in the first Instance.

10. When the Pursuer before an inferior Court doth advocate the Caufe, he must call his Advocation as a Summons, and give it out with the Process to the Defender's Advocate to fee. If he fail so to do, within Fifteen Seffion Days after admitting of the Advocation in the inferior Court, the Defender may call for the Advocation, by putting up a protest Action in the Minute-book. Whereupon, if the Purfuer produce not his Advocation with the principal Process, and an Outgiving thereon, the Protestation and Remit will be given out to be extracted. When the Advocation is so produ-Qq3

(a) Act of Seder. 20 Nov. 1711. 54

Defender's Advocate to be seen, he is allowed, before he return the same, to inrol it in the Roll of Advocations, upon his own Return. In order whereumto, he may keep up the Process Six Days for seeing, and till the first Saturday thereafter for inrolling (a).

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At discussing the Reasons of Advocation, the Pursuer craves the Cause to be advocated; but cannot insist upon a Reason of Incompetency of the Judge, except such as did not take Place at the raising of his Process. The Desender pleads that the Cause ought to be remitted.

SECT. III. dela dela

Of Suspensions.

for, by putting up a Protestation in the Minute-book, and the Protestation for not producing the Suspension may be extracted; and the Suspension, when produced, is given out to be seen, returned, inrolled, and called before the Ordinary, in the same way as an Advocation-But in a Suspension of Multiple-poinding, it sufficeth to stop Protestation at the Instance of one of the Chargers, wanting the Concurrence of the rest, that the Suspension is extracted, the Charger producing the Suspension is extracted, the Charger producing the Suspension is extracted, the

⁽a) Act of Seder. I January. 1709. and and to the following

Ch. 2. Law of Scotland. Tit. 2. 93. 247

Charger may proceed in Diligence, as if no

Suspension had been past and in baniana

2. The Charger needs not to give out to the Suspender's Advocate to be seen the Letters of Horning, by virtue whereof the Charge was given, but it sufficeth to give out the Decreet, registred Bond, or other Deed whereon the Letters were raifed. Where there is any Thing general in the Charge, a Condescendence in Writ is given out with it, called the special

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Charge, sor example with a dr bugget la habitone 3. If at calling the Suspension before the Ordinary, the Charger be absent, or produce not his Charge, the Letters will be suspended till the Charge be produced. Yea, if the Sulpender extract and produce the Charge, and refer his Reasons of Suspension to the Ordinary, the same will be advised, and, if relevant and proven, the Letters will be suspended fimpliciter. But if the Charger infift when the Suspender is absent, or produceth not his Sulpension, the Charger gets a Protestation. After which, unless the Cause be again called, and the Suspension produced the same Week, it cannot be taken in by the Clerk, or the Suspender reponed without paying to the adverse Party Ten Shillings Sterling (a).

4. When both Parties compear, the Charger's Advocate repetes the Ground of his Charge, and craves the Letters may be found orderly proceeded: The Suspender resumes

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his Reasons of Suspension, not only such as are contained in the Letters, but allo eiked or added Reasons, if he any has, that were given out to be feen by the Charger's Advocate; for he cannot plead upon any other Reasons, unless he confign Twelve Pounds Scots, whereof Two Parts to be paid to the Charger, and a Third to the Poor (a). But he may produce incidenter Writs to verify the Reasons; and propone other Reasons neither libelled nor eiked, provided these and the Instructions thereof be lodged in the Clerk's Hands, Twenty four

Hours before calling of the Caufe.

5. Reasons of Suspension must not only be relevant and instantly instructed, or referred to the Charger's Oath, but also competent by way of Suspension: Otherwise they will be repelled, and referved to be founded on by way of Reduction. But when Reasons of Suspension confift in Fact, which can be instructed only by extraneous Perfons, or by Writs not supposed to be in the Suspender's Hand, a Day will be in some Cases assigned for proving thereof, and Diligence granted against Witnesses and Havers of Writs. The Suspender, that he may be allowed to prove fuch Reasons, doth at the fame Time with the Suspension, raise and execure a Summons of Reduction against the Charger, upon the fame Reasons contained in the Suspension, and others; and founds his Sus-

⁽a) Act of Reg. concern. the Self. 1672. Art. 24. Act of Seder. 20 Nov. 1711. 9 8.

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pension upon the Reduction, which, with the Suspension, is given out to be seen. At the Calling of which Suspension, if he hold the Production satisfied by the Charge, he will upon repeting his Reasons of Suspension and Reduction as co-incident, get the same Term to prove in both Processes. But if the Suspender will not hold the Production satisfied by the Charge, he must content himself to debate his proper Reasons of Suspension only; and the Action of Reduction will be reserved to him as accords.

6. There are two Kinds of Decreets of Sulapension, viz. condemnatory and absolutory.

A Decreet condemnatory is, when the Letters are found orderly proceeded. Which is done either fimpliciter, or with a Limitation; as when the Lords find the Letters orderly proceeded in part, and suspend them for the rest; or orderly proceeded conditionally, that is, if something be performed by the Charger.

A Decreet absolvitory is, when the Letters are suspended either simply or conditionally, that is, if something be done by the Suspender.

7. When the Letters are found orderly proceeded fimpliciter, and it appears that the Reasons of Suspension have been calumnious, the Charger offers a Bill to the Lords in Presence, eraving his Expences, conform to an Account thereof given in with the Petition. Upon advising whereof, the Lords either consider the Account

Abatement, or modifie the same, or remit the Consideration thereof to the Ordinary in the Cause, to modifie Expences. And generally the Lords modifie large Expences to Perfons lesed by calumnious Alledgances (a).

8. A Decreet finding the Letters orderly proceeded fimply, being extracted, Horning and other Diligence formerly raised may be put to further Execution. When Letters are found orderly proceeded only for a part of the Charge, or conditionally, new Letters of Horning or Diligence must be raised upon the Decreet of Suspension. And always new Letters must be raised for Payment of Expences, if any be de-The Charger may also extract out of the Bill-chamber the Bond of Cautionry, given at expeding the Suspension, and charge the Cautioner, by virtue of Letters of Horning raifed thereon, for Payment of the Sums decerned, which he will be liable for, the the Charge had been turn'd into a Libel (b). The Cautioner being discuss'd, his Attester may be pursued subsidiarily, and will be liable as fully in his Order, as the Cautioner himself (c). If an insufficient Cautioner or Attester hath been received, subsidiary Action is competent against the Clerk of the Bills, who received fuch a Cautioner, or against the principal Clerks, or even

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⁽a) Act of Seder. 20 Nov. 1711. \$ 14. (b) Act of Seder. 27 Nov. 1709. (c) Ibid.

Ch. 2. Law of Scotland. Tit. 2, §4. 251

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against the Clerk Register, who is answerable for his Deputies. SECT. IV.

Of Reduction of Decreets.

HAVING treated of Reductions in general, as Actions in the first Instance, elfewhere (a); I take notice here only of Reduction of Decreets in the fecond Instance.

1. The Lords of Seffion may not only reduce the Decreets of all inferior Courts, but also may reduce their own Decreets. Whereas no inferior Judge, except the high Admiral (b), can review his own extracted Decreet. The Lords eafily reduce their own Decreets in Absence, where either the Defender never compeared, or pass'd from his Compearance before proponing Peremptors. They may also. reduce their own Decreets in fore upon Nullities: But not upon Alledgances competent and omitted to be proposed before Sentence, or proponed and repelled.

2. Certification will not be granted against Warnings, Executions, or Minutes of Process, which are minute Papers that cannot be long preferv'd; unless the Decreets be recently quarrelled by Reduction. But if fuch small

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⁽a) Vid. fupra B. 1. Ch. 2. Tit. 2. 3 2. (b) Act 16. Parle 3. Ch. II.

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Warrants be extant, the Clerks must produce them.

3. When Parties conceive themselves lesed by any Sentence of the Lords of Session, whether in ordinary Actions, or Suspensions, or other Causes discussed by them, and do not incline to seek Redress from the Lords themselves, by the Means of petitioning, or have sought it in vain, they have now Recourse, as their last Shift, to protest for Remedy of Law, and appeal to the Lords in Parliament assembled.

SECT. V.

Of Protests for Remedy of Law, and Appeals:

I. WHEN a Person designs to protest for Remedy of Law, and appeal, he, or his Attorney by a Writing under his Hand impowered to protest, compears at the inner House Bar, while the Lords are fitting, and produces a Writing figned by himfelf or his Constituent, mentioning the Interlocutors one or more, whereby he thinks himself injured, with the Reasons for which he conceives these Interlocutors should be revers'd: And for Remedy of a Law against the same, the Party or Attorney in his Name protests and appeals to the Lords in Parliament, and thereupon craves Instruments of Court. This written Protestation, with a Piece of Money in Name of Instrument Money, is delivered to the Clerk of the Process, or to any Ch.

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any other of the inner House Clerks. The Party protesting doth also commonly bring with him a Notary, in whose Hands he also takes Instruments, before Witnesses present.

2. Then the Appellant presents a Petition to the House of Peers, setting forth his Appeal, and praying that such Decree or Interlocutors may be revers d, and fuch other Order and Decree made for his Relief in the faid Matter, as to their great Wisdom should seem meet; and in order thereunto, that their Lordships would be pleas'd to award the usual Order or Summons, requiring the Person, in whose favour Judgment was given in the Court of Seffion, by a short Day to give his Answer thereto. Upon reading this Petition and Appeal, the Lords order the faid Person to have a Copy of the faid Appeal, and to put in his Answer on or before a certain Day. Any Body may ferve the Party with, or deliver to him, a Copy of the faid Appeal; who before a Judge makes affidavit, that he hath done fo. After an Appeal is received by the House of Peers, and an Order by them for the Respondent to answer, and Notice of such Order duly ferved on the Respondent, the Sentence or Deeree appealed against from fuch Time ought not to be carried on into Execution by any Process what bever.

3. In order to have the Matter of the Appeal fully understood, when it comes in to be determined, the Appellant and Respondent give

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ed by their respective Council at Law.

4. Upon the Day appointed by the House, the Petition and Answer thereto is read, and the Lords, after hearing the Council of the Parties at the Bar of the House, proceed to Judgment, by reversing or affirming the Decree.

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Of the Commission for Plantation of Churches, Valuation of Tithes, &c. and the Form of proceeding before that Court.

augmenting Stipends to Minifters, out of the Tithes, valuing and felling of Tithes; erecting or transporting Churches; uniting, annexing, dividing and dismembring Parishes; Commissioners have, from Time to Time, been appointed by the Parliament of Scotland. But in the Year 1707. the Lords of Session were authorized to judge in all the Assairs and Causes aforesaid, as sully and freely as they do in other civil Causes (a). For supplying the Registers of the Commission, burnt

⁽⁴⁾ Act 9. Seff. 4. Parl. Q. A.

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of e burnt in the Fire that happened in Edinburgh in the Year 1700. any authentick Extracts from the faid Records are ordained, upon being prefented to the Lords, viz. by a Petition, to be recorded in a particular Register, and to be kept by the Clerk Register and his Deputies, which are now as good as the principal Warrants, if extant: The Ingiver gets a new Extract gratis, in lieu of the old; and Extracts from these new Records, make the like Faith, as Extracts from the old Records were wont to do. Farther, the faid Lords are impowered to make up the Tenor of fuch Decreers, whereof Extracts are a missing, and the Registers burnt in the faid Fire, upon fuch Evidents and Adminicles as they fee Caufe (a).

2. The Lords are ferv'd here by Clerks and

Macers, distinct from those of the Session.

3. Summonses before this Court, which are raised by the Clerk Register and his Deputies, and pass the King's Signet (b), have but one Diet, and are executed by a Messenger at Arms upon six Days, against Persons living in Scotland, and upon Sixty Days against one out of Scotland.

4. This Court fits each Wednesday, during the Session. Between two and three in the Asternoon, before the Lords meet, the Clerk calls Summonses, whereof the Days of Compearance are come, and the Process, being given out, seen and returned, is entred in a Book

^{(1}bid. (6) 1bid.

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Book of Involment kept by the Clerk of the Court. This Clerk every Munday affixes fipon the Walls of the inner and outer House a Roll of Causes to be called that Week, according to the Order in the Book, containing, t. Ordinary Actions. . 2. Acts. 3. Caules to be prepared. 4. Concluded Caufes. The Lords fit down at three a Clock in the inner House, for there is no Occasion for an Ordinary in the outer House, and continue ordinarily till five, if the Roll be not discussed sooner. They advise and vote with shut Doors. Petitions and Answers are first advised, then ordinary Actions are called: Wherein an Act of Litifcontestation may be extracted immediately after pronouncing, unless the President fign a written Stop, or a reclaiming Petition be lodged in the Clerk's Hands, before the Extract is given out, which Bill must be offered to the Lords the next Sederunt Day after. When ordinary Actions are over, Acts are called, and Parties and Withelfes thereupon make Faith; who are examined, after rifing of the Court, by an Ordinary appointed for that end. Avilandum is made with Proof produced, and remitted to an Ordinary to prepare a State thereof: In order to which, the Cause is put in a Roll of concluded Causes to be prepared. When the State is prepared, it is entred into a Roll of concluded Causes to be advised. Which Roll is called after the Acts are over. Decreets in this Court eannot be extracted till the next Sederunt, after that

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If within that Time any reclaiming Bill be given in, that must be advised before Decreet is given out. But if no Petition be offered betwixt and the next Court Day after Date of the Sentence, the Clerk cannot refuse an Extract. These aforesaid are mostly the Specialities in the general Form of proceeding in this Court: For in other Things Processes are managed as before the Session.

5. The Commission modifies for a Stipend to a Minister in a Country Parish at least 800 Merks, or 8 Chalders of Victual, except there be particular Reasons for going below that Proportion (a). In allocating a Stipend on the Tithes of his Parish, the free Tithes in the Titular's Hand, and any Tack-duty paid to him, are destined for that End, before any Heriton as Tacksman of his own Tithes is burdened. When a Minister pursues a Modification, or Locality, or Augmentation, the Titular of the Tithes must be cited. Sometimes a Minister, for the more Dispatch, gives in a Rental of the Stock, and Tithes of the Parish, and offers to prove it by the Oaths of the Defenders: Conform to which the Stipend is modified and localled upon them, if holden as confelt. in the sure standard of

only at the Instance of Heritors, but also of Ministers, or Titulars, or Tacksmen, who

⁽a) A& 8. Parl, 1, Ch. I,

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must call the Heritor and Adjudgers in Possession, in a Process at their Instance, and must be cited when the Heritor pursues. If the Church be vacant, the Heritor must cite the Moderator of the Presbytery, and Agent of the Church. All Tithes may be valued (a), except decima incluse, feued with the Stock. There must be feparate Valuations of Parsonage and Vicarage belonging to distinct Titulars. The Vicarage Tithes, which are local and variable, must be rated according to Use of Payment; and the Parsonage, according to the Sowing and Increase of the Lands, and the several Grains. A Calcule is made of thefe, for Seven Years preceeding, and the Seventh Part of the Total of the Rents for these Years, is reckoned the true Rent communibus annis, of which the Fifth is established as the Value of the Tithes; but then some Deduction is given to the Heritor upon the account of Cote-houses, and other industrial, or costly Improvements. In all Cases a joint Proof is allowed to the Heritor (b). An Heritor, or Liferenter by Infeftment, during the Dependence of a Process at his Instance, valuing his Tithes, may get the leading of them, if he apply for it, upon finding Caution to pay, in the Event, conform to the Valuation to be made; but fuch a Warrant for leading, falls by the Defender's taking out a Protestation for not insisting (c). The Titular

⁽a) Act 30. Seff. 2. Parl. W. and M. (b) Ibid. (c) Act 24. Seff. 4. ibid.

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of the Tithes, after a Valuation, may claim a real Security by Infeftment for the valued

Duty.

7. Ordinary Tithes, being valued, may be bought at the Price allowed by Law (a). The Method taken with Tacksmen, in a Sale of Tithes, is to value the Tithes, and stock the valued Duty in a principal Sum answering to so many Years Purchase, as the Tithes are sold for

The Heritor is obliged to give Security to the Tacksmen, for the Annualrent thereoff during the Course of his Tack, and to the Titular, for the principal Sum, after expiring of the temporary Right. After a Decreet of Sale, the Heritor is inseft in the Tithes, upon a Disposition from the Titular, reserving to himself Relief of the King's Annuity, and of all Impositions laid, or to be laid on these Tithes, and warranting only from his own, and his Predecessors Facts and Deeds.

8. The Smalness of Parishes, and their Stipends, is the Reason for turning two into one. By the Union of Two whole Parishes, sometimes one of the Churches is suppressed, and the other declared to be the common Church, for all the Parishioners within the united Bounds; and if neither of the united Churches be in a Place, where the Generality of the Parishioners may repair to; then both are demolished, and a new one erected, about the Cen-

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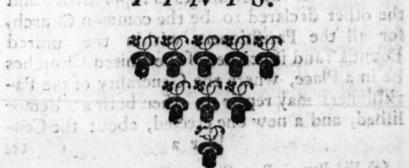
⁽⁴⁾ Vidi Part z. B. i. Chap. z. Tit. i;

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ter of the common Parish. Sometimes Two Parishes are so united, that both Churches are kept up to be served by one Minister alternatively. Sometimes a large Parish is dismembred of some Lands, to make up another. Where a Parish is so wide, and far extended, that the Inhabitants, in the remoter Parts, by their Distance from the Church, or the Interjection of Waters, cannot have Access, upon all Occasions, to partake in the Administration of the divine Ordinances; the common Remedy is, to make of one two Patishes, and build another Church in a convenient Place, for the new Erection. But the transporting of Churches, disjoyning too large Parishes, and erecting new Churches, must be, with Confent of the Heritors of Three Parts of Four of the Valuation of the Parish, whereof the Church is craved to be transported, or the Parish to be disjoyned, and new Church to be erected (a).

(4) A& 9. Seff. 4. Parl. O. Anne.

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